ADEQUATE ACCESS OR EQUAL TREATMENT: LOOKING BEYOND THE IDEA TO SECTION 504 IN A POST-*SCHAFFER* PUBLIC SCHOOL

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In light of the Supreme Court's decision this Term in Schaffer v. Weast, *this Note analyzes the current state of special education law and argues that parents, attorneys, and advocates should look beyond the Individuals with Disabilities Education Act (IDEA) to Section 504 in the post-*Schaffer *public school. This Note shows how these two standards operate in the context of state special schools for the blind and deaf. A state-by-state survey of thirty states' special school admission policies and practices reveals the IDEA's limitations and Section 504's potentially complementary role.*

*Although other works have briefly compared the IDEA and Section 504, this Note is the first post-*Schaffer *comparison and also the first to use a specific policy context to demonstrate how the two statutes interact and complement each other; it is also the first published study on the exclusion of multi-disabled students from state special schools. As the state special school context illustrates, Section 504 is a powerful, yet oft-neglected, complement to the IDEA. Whereas the IDEA focuses on adequate access to a free appropriate public education (FAPE), Section 504 emphasizes equal treatment within federally funded programs. This Note advocates that policymakers and special education attorneys understand how to utilize both Section 504 and the IDEA in order to make sure that no child is left behind or otherwise excluded from educational opportunities solely on the basis of a disability. This understanding is particularly important in the post-*Schaffer *public school.*

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INTRODUCTION

In the public school special education context, the Individuals with Disabilities Education Act (IDEA)[1] has served as the dominant tool for ensuring that no child is left behind on the basis of a disability. But the IDEA approach is not without drawbacks. Addressing the Act's many limitations, the Supreme Court held this Term in *Schaffer v. Weast* that the IDEA forces parents, not schools, to prove that their children are not receiving a free appropriate public education (FAPE).[2] The 6-2 *Schaffer* decision, in which Chief Justice Roberts took no part, was not particularly surprising. Placing the

1. 20 U.S.C. §§ 1400-1420 (2006); 34 C.F.R. §§ 300.1-304.32 (2006). For more on the IDEA, see *infra* Part II.A.

2. 126 S. Ct. 528, 537 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."). Because the "plain text of the IDEA is silent on the allocation of the burden of persuasion," *id.* at 534, the Court turned to "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims," *id.* (citing 2 MCCORMICK ON EVIDENCE § 337 at 12 (5th ed. 1999)). Although Congress can make exceptions to the general default rule, the Court found no intent to make an exception with respect to the IDEA. *Id.* at 535.

Another case that could greatly weaken parents' rights under the IDEA is currently working its way to the Supreme Court. In *Winkleman v. Parma City School District*, 150 Fed. App'x 406 (6th Cir. 2006), the Sixth Circuit held that while parents may represent their children in administrative proceedings, they may not appear in federal court to assert their child's substantive rights under the IDEA. Circuits are split on this issue, and Justice Stevens stayed the decision in *Winkleman* so that the parents could file certiorari. *See* Winkleman v. Parma City Sch. Dist., No. 04-4159, 2006 WL 172224, at *2 (6th Cir. Jan. 25, 2006) (detailing Justice Stevens's decision to stay the Sixth Circuit's decision).

burden of proof on the party seeking relief is the ordinary default rule when Congress is silent, and most states already required this standard in IDEA challenges.[3] However, the dissents and amicus briefs in *Schaffer* illustrate the obstacles that parents must overcome when challenging a school's decision under the IDEA.

In her dissent in *Schaffer*, Justice Ginsburg emphasizes the unequal playing field in the battles between schools and parents under the IDEA and finds an unlikely ally in Judge Luttig of the Fourth Circuit: "For reasons well stated by Circuit Judge Luttig, dissenting in the Court of Appeals, . . . I am persuaded that 'policy considerations, convenience, and fairness' call for assigning the burden of proof to the school district in this case."[4] Judge Luttig aptly describes these considerations:

> For the vast majority of parents whose children require the benefits and protections provided in the IDEA, the specialized language and technical educational analysis with which they must familiarize themselves as a consequence of their child's disability will likely be obscure, if not bewildering. By the same token, most of these parents will find the educational program proposed by the school district resistant to challenge: the school district will have better information about the resources available to it, as well as the benefit of its experience with other disabled children.[5]

The amicus brief by the parents, attorneys, and advocates further illustrates why parents have an uphill battle under the IDEA. Among their arguments, the amicus petitioners assert that parents do not have "full, unfettered access to all relevant information about a proposed placement" or to the school's "experts who have worked with or evaluated the child," that "parents often proceed pro se and do not . . . have any experience in the mechanisms for presenting evidence," and that "there is usually no right to discovery by which the parents can obtain documents . . . [or] depose school district employees."[6] Indeed, while the outcome in *Schaffer* might have been unsurprising, the Court's focus on the IDEA underscored how unequal the playing field is for students with special needs looking to obtain an adequate education under the IDEA.

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3. The Supreme Court does note, however, that some state legislatures have attempted to "override the default rule and put the burden always on the school district." *Schaffer*, 126 S. Ct. at 537. But the Court declines to address whether states could override the default rule in the IDEA setting because the parties did not raise the issue, and the state of Maryland had no such provision. *Id.*

4. *Id.* at 538 (Ginsburg, J., dissenting). Although Justice Stevens sided with the majority because he believes "that we should presume that public school officials are properly performing their difficult responsibilities" under the IDEA, he indicates in his concurrence that he "agree[s] with much of what Justice Ginsburg has written about the special aspects of this statute." *Id.* at 537 (Stevens, J., concurring). Justice Breyer focuses his dissent on the fact that because Congress is silent on this issue, the decision should be left to the states, not the federal courts. *See id.* at 541 (Breyer, J., dissenting).

5. Weast v. Schaffer, 377 F.3d 449, 458-59 (4th Cir. 2004) (Luttig, J., dissenting).

6. *See* Brief of Amici Curiae Council of Parent Attorneys and Advocates, Schaffer v. Weast, 126 S. Ct. 528 (2005) (No. 04-698), 2005 WL 1031637, at *7-8.

And the playing field arguably became even more unequal when Congress reauthorized the IDEA in 2004.[7] The proposed regulations have yet to become official, which makes it difficult to measure the full impact of the IDEA's reauthorization.[8] Professor Paolo Annino summarizes some of the potentially negative ramifications of the new IDEA:

> [M]any of the [IDEA] Improvement Act's revisions are harmful to children pursuing a FAPE and dilute their due process protections. These harmful changes include the elimination of short term objectives on the [Individualized Education Program (IEP)]; the elimination of the requirement that schools inform parents whether their child's progress is sufficient to enable him or her to achieve annual goals listed in the IEP; the waiver of the right to have a child reevaluated at least once every three years; removal of children for certain disciplinary problems to an interim placement for 45 school days; reduction of services provided to those children removed; the elimination of the stay put provision in discipline cases; and the reduction of discipline protections for children not yet eligible for special education.[9]

Furthermore, the IDEA focuses on guaranteeing education to students with special needs, but, in many cases, parents are just as concerned that their child was discriminated against—and that other children with similar needs would likewise face similar discriminatory practices. As further explored in Part II, the IDEA allows for an individualized analysis and is thus not a particularly effective tool for systemic reform.

However, Section 504 of the Rehabilitation Act (Section 504)[10] is a powerful, yet oft-neglected, complement to the IDEA—perhaps more powerful and effective in certain instances—if it is understood and applied correctly. The overall comparison of the IDEA and Section 504 is complicated, but important. As explored in Parts II and III, these legal standards often accomplish similar objectives, but do so by using different instruments and driving principles. In essence, the IDEA focuses on *adequate access to a FAPE*, while Section 504

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7. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (amending 20 U.S.C. §§ 1400-1482 (2004)). For a brief summary of the 2004 amendments, see Diana B. Glick, *Statutory Spotlight: Individuals with Disabilities Education Act 2004*, 9 U.C. DAVIS J. JUV. L. & POL'Y 439 (2005). For detailed discussion of various aspects of the amended legislation, see Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms To Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071 (2005); Demetra Edwards, Note, *New Amendments to Resolving Special Education Disputes: Any Good Ideas?*, 5 PEPP. DISP. RESOL. L.J. 137 (2005).

8. *See* Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities; and Service Obligations Under Special Education—Personnel Development To Improve Services and Results for Children with Disabilities, 70 Fed. Reg. 35,782-35,892 (July 21, 2005) (proposing amendments to 34 C.F.R. pts. 300, 301, 304). The U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSEP) has developed a series of topic briefs around several high-interest areas of the 2004 IDEA. *See* IDEA 2004 Resources, *available at* http://www.ed.gov/policy/speced/guid/idea/idea2004.html (last visited Mar. 5, 2006).

9. Paolo Annino, *The Revised IDEA: Will It Help Children with Disabilities?*, 29 Mental & Physical Disability L. Rep. 11, 13 (2005).

10. 29 U.S.C. § 794(a) (2006). For more on Section 504, see *infra* Part II.B.

emphasizes *equal treatment* within federally funded programs.[11] The IDEA is not about antidiscrimination, but rather a guarantee of access to public education for children with disabilities.[12] Conversely, Section 504 emerged specifically in response to discrimination against individuals with disabilities.[13] Neither standard alone accurately depicts the principles at play in most special education cases. Instead, we must understand both standards and how they interact to better understand how to address discriminatory practices that inhibit students with disabilities from receiving the free and appropriate public education to which they are entitled under federal law.

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11. This specific distinction between the IDEA and Section 504 is, as far as I know, an original one. It was first conceived while I was enrolled in the Stanford Youth Education Law Project, under the direction of Professor Bill Koski and Clinic Fellow Molly Dunn, and later developed in master's thesis research at Harvard University's Kennedy School of Government, under the direction of Professors Julie Wilson and Mary Ruggie. *See* Christopher J. Walker, Equal Treatment and Adequate Access: An Analysis of the Admittance of Multi-Disabled Students into the California State Special Schools for the Blind and Deaf (Mar. 2005) (unpublished master's thesis) (on file with author).

12. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 180 (1982) ("Dissatisfied with the progress being made under these earlier enactments, and spurred by two District Court decisions holding that handicapped children should be given access to a public education, Congress [enacted the IDEA] . . . .") (citation omitted); *see also* Olmstead v. L.C., 527 U.S. 581, 623 n.6 (1999) (Thomas, J., dissenting) ("IDEA is not an anti-discrimination law. It is a grant program that affirmatively requires States accepting federal funds to provide disabled children with a 'free appropriate public education.'"). The *Rowley* Court further explains that "[t]he *right of access to free public education* enunciated by these cases [which spurred the creation of the IDEA] is significantly different from any notion of absolute *equality of opportunity* regardless of capacity." *Rowley*, 458 U.S. at 199 (emphasis added); *see also* Mark Kelman, *The Moral Foundations of Special Education Law*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 84 (Chester E. Finn et al. eds., 2001) [hereinafter RETHINKING SPECIAL EDUCATION] ("But many just claims are not civil rights claims. . . . Until we see that these [many IDEA claims] are important education issues but not civil rights claims, we will not make rational policy in this area.").

13. *See* 34 C.F.R. pt. 104, § 104.1 (2006) ("The purpose of this part [of the Code of Federal Regulations] is to effectuate section 504 of the Rehabilitation Act of 1973, which is *designed to eliminate discrimination* on the basis of handicap in any program or activity receiving Federal financial assistance.") (emphasis added).

Disability-based discrimination differs from other types of discrimination, in that the concept of treating people "equally" can be misleading. For instance, when the Topeka school district was ordered to desegregate, all school administrators needed to do was open their schools' doors to African-American students. However, if the district were ordered to desegregate based on disability—i.e., the schools were not "mainstreaming" students in wheelchairs—"opening doors" would probably be insufficient; the schools would also need to widen doors, add ramps, and so forth. Thus, Section 504's "equal treatment" often requires schools to make accommodations or modifications so that those with disabilities are treated the same as their nondisabled classmates—and so that they can receive a free appropriate public education. Thanks are due to Professor Rosenbaum for this important distinction. *See generally* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004) (detailing the antidiscrimination paradigm of the Americans with Disabilities Act and similar disability initiatives and arguing that disability rights advocates should urge a return to a social welfarist perspective).

In this Note, the lens through which we view these legal standards in action involves state special schools for the blind and deaf and their admission practices that exclude multi-disabled students. Part I first illustrates the limitations of the IDEA in California's state special schools through the story of Holly P.; it then further demonstrates the need to supplement the IDEA with Section 504 through a state-by-state survey of thirty states' state special schools admission. Detailed analysis of each state special school system is included in the Appendix. Part II explores the contrasting legal standards of adequate access to a FAPE under the IDEA and equal treatment under Section 504, as applied to the state special school context. Finally, Part III moves beyond the state special school context to examine special education generally—demonstrating how Section 504 is a powerful tool, and an excellent complement to the IDEA, for making sure that no child is left behind[14] or otherwise excluded from educational opportunities solely on the basis of a disability.[15] This understanding is particularly important for special education attorneys and advocates as they attempt to look beyond the IDEA in a post-*Schaffer* public school context.

I. THE POLICY CONTEXT: MULTI-DISABLED STUDENTS AND STATE SPECIAL SCHOOLS FOR THE BLIND AND DEAF

Multi-disabled blind and deaf children are entitled to a free appropriate public education (FAPE) under state and federal law, including any communicative and related services necessary for them to benefit from special education.[16] However, state special schools in California—and in many states nationwide—either explicitly exclude multi-disabled blind and deaf students in their admission policies or informally exclude them in practice.[17] When these schools were founded in the nineteenth century, many children were "pure blind" or "pure deaf," so the establishment of special schools for the pure blind and deaf was a logical and meaningful public policy.[18]

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14. The reference to the No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.), is not just a play on words. While beyond the scope of this Note, NCLB has arguably raised the bar for K-12 public education—including K-12 schools' assistance for children with disabilities. *See generally* Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN'S L.J. 1 (2004).

15. Section 504's power in the K-12 context could be greatly limited if courts decide to strike down the implementing regulations and adopt a reasonable accommodations standard in place of the current standard. *See infra* Part II.B.4.

16. 20 U.S.C. § 1400 (2006); *see, e.g.*, CAL. EDUC. CODE § 56000 (2006); *see also infra* Part II.

17. *See infra* Part I.A-B.

18. This conclusion about the history and origin of special schools for the blind and deaf cannot be found in any particular publication, but it was uncovered by searching the mission statements and histories of such schools in twenty-nine states and the District of

However, with advancements in medicine and technology, "pure" blindness and deafness have become less common.[19] Instead, children born with hearing or visual impairments are also likely to have other disabilities. Estimates vary widely, but many researchers have found that approximately thirty percent of all school-aged deaf children have at least one additional disability,[20] with mental retardation, cerebral palsy, aphasoid, and emotional-behavioral disorders being the most common nonsensory disabilities.[21] The majority of blind children also have at least one additional disability. As many as two-thirds of blind children and one-third of partially sighted children have additional disabilities, the most common of which are mental retardation, hearing impairment, cerebral palsy, and seizure disorders.[22]

Columbia. *See infra* Appendix; *see also infra* notes 36-54 and accompanying text (describing the results of the state-by-state survey reported in this Note). For an example of such history, see CALIFORNIA SCHOOL FOR THE DEAF, HISTORY 1860-1950 (1986), *available at* http://www.csb-cde.ca.gov/Documents/History.htm (last visited Mar. 5, 2006).

19. At first blush, this finding seems counterintuitive. But with better technologies and medical procedures to correct visual and hearing impairments—e.g., through surgery, ocular and cochlear implants, and so forth—those who are born with pure blindness or deafness have become more rare. Consequently, blind and deaf children with other severe disabilities have become a much larger proportion of the blind and deaf population. *See* sources cited in *infra* notes 20-22 (describing this finding in more detail).

20. Robert Lennan, *Factors in the Educational Placement of the Multihandicapped Hearing-Impaired Child*, *in* THE MULTI-HANDICAPPED HEARING IMPAIRED: IDENTIFICATION AND INSTRUCTION 40 (David Tweedie & Edgar H. Shroyer eds., 1982) [hereinafter IDENTIFICATION & INSTRUCTION] (stating that 30% of school-aged hearing-impaired children are multi-handicapped); David Tweedie & Edgar H. Shroyer, *Introduction*, *in* IDENTIFICATION & INSTRUCTION, *supra*, at 4 (stating that in 1974-1975, 29.1% of students enrolled in surveyed programs had one or more additional handicaps). *But cf.* Robert Anderson & Godfrey Stevens, *Practices and Problems in Educating Deaf Retarded Children in Residential Schools*, 35 EXCEPTIONAL CHILD. 687, 691 (1969) (discussing one study that found 15% of school-aged deaf children in California are also mentally retarded); Douglas Clark & Barry Griffing, *Defining the Multihandicapped Deaf Population*, 57 VIEWPOINTS TEACHING & LEARNING 1, 4 (1981) (stating that in most programs for the deaf at least 40% of the enrollment could be empirically designated as multi-handicapped); V. Flathouse, *Multiply Handicapped Deaf Children and Public Law 94-142*, 45 EXCEPTIONAL CHILD. 560, 564 (1979) (stating that 25% is a conservative estimate of the number of deaf children with an additional disability); Charlotte Hawkins-Shepard, *Educational Planning for Deaf Children with Learning Disabilities*, ERIC Doc. No. ED-150-789, at 3 (1977) (citing two studies that find that 25% or 14% of deaf children also have specific learning disabilities); Larry G. Stewart, *Hearing Impaired/Developmentally Disabled Persons in the United States: Definitions, Causes, Effects, and Prevalence Estimates*, 123 AM. ANNALS DEAF 495 (1978) (discussing the range of estimates in the literature of deaf mentally retarded children).

21. *See* Frank Bowe, *Deafness and Mental Retardation*, *in* EDUCATION AND REHABILITATION OF DEAF PERSONS WITH OTHER DISABILITIES 27 (Jerome D. Schein ed., 1974) [hereinafter EDUCATION & REHABILITATION]; Jerome D. Schein, *Multiply Handicapped Deaf Students: Definition of the Population and Rationale for Service*, *in* EDUCATION & REHABILITATION, *supra*, at 6-14; McCay Vernon, *Multihandicapped Deaf Children: Types and Causes*, *in* IDENTIFICATION & INSTRUCTION, *supra* note 20, at 10-28.

22. Marijean Miller et al., *Vision: Our Window to the World*, *in* CHILDREN WITH DISABILITIES 188 (5th ed. 2002); *see also* KAY A. FERRELL, PROJECT PRISM: A LONGITUDINAL STUDY OF DEVELOPMENTAL PATTERNS OF CHILDREN WHO ARE VISUALLY

Consequently, the state special schools have effectively served a special population for the last 150 years, but changed circumstances—a lower incidence of pure blindness and deafness and a rise in the proportional number of multi-disabled blind and deaf students—have created a situation in which these schools purposefully exclude the children who would benefit most from their services and who currently may not receive a FAPE anywhere else in the public school system. In this Part, the policy environment at the California state special schools will first be outlined through the story of Holly P., followed by the findings from the state-by-state survey of twenty-nine states and the District of Columbia. Part II then uses this specific context to illustrate in depth how the IDEA and Section 504 interact and complement each other.

A. *The Unfriendly Sandbox: The Story of Holly P. and the California State Special Schools for the Blind and Deaf*

To understand the situation of multi-disabled students in state special schools, consider the story of Holly P.[23] In 1994, Holly was born two weeks late with a high fever and signs of infection. After ten days in the intensive care unit, Holly was sent home. During the next year, her mother noted many irregularities, and Holly was ultimately diagnosed as deaf when she was twelve months old. Doctors performed additional tests that confirmed she also had a mild case of Turner's Syndrome (e.g., underdeveloped and disproportionately developed limbs, bones, and organs), as well as developmental delays that fell outside of Turner's Syndrome. Holly was not only deaf but also unable to speak. When she was fifteen months old, Holly was assessed through her school district's special education local plan area (SELPA), and she was placed at a local children's center that specialized in preschool special education. After a few months at this center, the specialists recommended that she attend the

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IMPAIRED (1998); Stuart Teplin, *Visual Impairments in Infants and Young Children*, 8 INFANTS & YOUNG CHILD. 18-50 (1995). There are approximately 100,000 blind and visually impaired children in the United States. Legal blindness is defined as visual acuity of 20/200 or less in the better eye or a visual field of 20 degrees or less (normal is 105 degrees). In fact, many children who are "legally blind" maintain some vision and can distinguish between light and dark or may be able to see enlarged print. Low vision is defined as the inability to see or read ordinary newspaper print even when wearing glasses, which corresponds to a visual acuity of greater than 20/200 but less than 20/70 with correction. Children with low vision will require accommodations for reading, and some will progress to blindness over time. *See* Carol Castellano, *A Brief Look at the Education of Blind Children*, FUTURE REFLECTIONS, Spring/Summer 2004, *available at* http://www.nfb.org/fr/fr13/fr04ss07.htm (last visited Mar. 5, 2006).

23. Holly's story is a real account, though names and certain facts have been changed to protect anonymity. I have met with Holly's family on several occasions, including a personal interview with one of her parents on November 8, 2005, from which I have drawn the quotations and key facts in Part I.A. My many thanks to her family for allowing me to share her story and for humanizing a pressing policy problem. Personal Interview with Parent of Holly P. (Nov. 8, 2005) (transcript on file with author) [hereinafter Parent of Holly P. Interview]. Thanks also to my sister, Holly, for allowing me to use her name.

preschool program at the California State Special School for the Deaf (CSD) in Fremont.[24]

Holly arrived at CSD in November of 1996, and her parents initially thought of CSD as a "magical and wonderful place."[25] Holly received a comprehensive education, including American Sign Language (ASL) training, speech and language therapy for deaf students, occupational therapy, and adaptive physical education. Additionally, the CSD program included weekly home visits (where her teacher observed Holly in her home setting), weekly classes in ASL at CSD for family and friends, and group therapy sessions for parents and siblings each Friday. As her mother remarked, "Intervention does not get any better than that."[26] CSD provided a variety of services for multi-disabled deaf children that were unrivaled in the state, and Holly progressed exponentially in her preschool program there.

The situation changed as the school and others became aware that Holly was more than deaf: she was multi-disabled. As her parents met with the district and CSD teachers and administrators to develop Holly's Individualized Education Program (IEP), it became clear that she would continue to need services beyond those provided to "pure" deaf students in order to benefit from her education—including speech and language therapy, occupational therapy, and a one-to-one (1:1) special education aid. At that point, her parents noted that "CSD was no longer a friendly sandbox."[27] Not only were CSD

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24. The California state education system operates three state public special schools for the blind and deaf. No private alternatives are in place for blind and deaf students in the state. The California Schools for the Deaf (CSD) are located in Riverside and Fremont. Each school provides a comprehensive nonresidential and residential programs composed of academic, nonacademic, and extracurricular activities. For more information on CSD, see http://www.cde.ca.gov/sp/ss/sd/. *See also* CAL. SCH. FOR DEAF, VISION, MISSION, BELIEFS, ESLRs, *available at* http://www.csdf.k12.ca.us/mission.pdf (last visited Mar. 15, 2006) ("The mission of the California School for the Deaf is to provide comprehensive educational programs which create a strong foundation for future learning among graduates in an accessible learning *environment that recognizes Deaf students and adults as culturally and linguistically distinct.*") (emphasis added).

There is only one state special school for the blind, which is also located in Fremont, directly across the street from CSD. The California School for the Blind (CSB) is a statewide resource offering expertise in the low prevalence disabilities of visual impairment and deaf-blindness through innovative model programs, assessment, consultation and technical assistance, professional development, research and publications, advocacy, and outreach. For more information on CSB, see http://www.csb-cde.ca.gov/. It should be noted that CSB's Mission Statement explicitly includes multi-disabled students: "The California School for the Blind provides intensive, disability specific educational services for enrolled students who are blind, visually impaired, deafblind, and visually impaired/multi-disabled, whose primary learning needs are related to their visual impairment." *Id.* However, further research and interviews have revealed that this policy is seldom applied in practice, and the California Department of Education's Specialized Programs Branch Administrative Manual specifies the criteria for admissions. *See* CAL. EDUC. DEP'T, SPBA MANUAL § 5210 (2004).

25. Parent of Holly P. Interview, *supra* note 23.

26. *Id.*

27. *Id.*

administrators requesting that she be transferred to a local school in her home district, but parents of other students and other members of the deaf community began to demand that Holly be removed from CSD.[28] After all, they explained, CSD was there to serve nondisabled students: as deaf culture teaches, "pure" deaf students are not disabled; they merely speak a different language (i.e., ASL). Holly, on the other hand, was deaf, nonverbal, and developmentally delayed, and her presence sent the wrong message to "pure deaf" students.

Holly's parents sought other options in the state,[29] but they did not find any school or program in California that could provide an education remotely as appropriate for Holly as that which had been provided by CSD. So, they resisted the demands. Their efforts kept Holly at CSD, but not without controversy or incident. The school took affirmative measures to push Holly out: A teacher sympathetic to Holly's situation was let go. Her parents were not invited to preregistration in 1998, and the school refused to accept her registration materials when presented. After resistance by her parents, the school allowed the registration but then tried to physically block Holly's entrance to the school on the first day of class.

Additionally, CSD created new, unwritten policies to exclude Holly. One of these policies required that if the district-provided 1:1 aid called in sick or did not show up, Holly would be sent home that day. On several occasions, Holly's mother would arrive at school, and the school would inform her of the 1:1 aid's absence, requesting that Holly remain at home that day. Instead, her mother would substitute as the aid. CSD administrators were upset with this arrangement, and the next time the aid was absent, CSD refused to allow the substitution. The administrators informed Holly's mother that they would call the sheriff to remove Holly if she tried to remain at CSD without the district-approved 1:1 aid. After calling her lawyer, who encouraged her to take Holly home, Holly's mother refused and called the school's bluff. She substituted as Holly's aid for the day, and no sheriff arrived to intervene. This unwritten policy is just one of many hoops that Holly's parents had to jump through for Holly to remain at the school. CSD continued to request that she be transferred.

Embarrassed and furious, Holly's parents returned to their lawyer to explore legal options, only to find that the traditional legal option was less than satisfying: the Individuals with Disabilities Education Act (IDEA).[30] Under the IDEA, Holly's parents would need to prove that the school violated Holly's right to a free appropriate public education (FAPE).[31] To do so, they would

28. These demands were not limited to comments at school events. Parents would call Holly's parents at home and tell them that they were not good parents because they did not put Holly in a place for "special" students. These callers told her parents that they were ruining the school and Holly P.'s life. As the months progressed, the phone calls became anonymous, and the messages became more offensive. *Id.*

29. In fact, Holly's parents also looked at special schools for the deaf in Idaho and Texas, as well as various programs on the East Coast. *Id.*

30. 20 U.S.C. §§ 1400-1420 (2006); 34 C.F.R. §§ 340.1-.32 (2006).

31. 20 U.S.C. § 1400 (2006); *see also* CAL. EDUC. CODE § 56000 (2006).

need to show that Holly could only derive a reasonable educational benefit from her IEP at CSD—and not at any other school in the district. Holly's parents, however, were not just concerned about whether Holly could receive a FAPE; they also were furious that a public school had singled out their daughter for unfair treatment and excluded her from her blind and deaf peers and from tax-supported programs—solely because she had an additional disability. They wanted to combat discrimination and unequal treatment, in addition to ensuring that Holly received adequate access to a FAPE. Any lawyer versed in the IDEA would inform them that discrimination is not a part of the IDEA and that they must focus on whether Holly benefited from the education.[32] Thus, the IDEA remedy did not match the discriminatory wrong. And, the Section 504 option was not discussed.[33]

Holly's story is not unique in California (or nationwide). Many parents and students have faced similar discrimination—at all three of the schools for the deaf and blind in California—and they have voiced their concerns about current state special school treatment of multi-disabled students.[34] In fact, the schools have admission policies that explicitly exclude certain multi-disabled blind and deaf children.[35] Based on these admission policies, blind and deaf

32. Holly's parents consulted with a lawyer, and last year they went through a due process hearing to make sure that Holly stayed at CSD. Currently, Holly is no longer in the preschool class—where she spent her first seven years of school—but she has been transferred to a third-grade classroom where the furniture actually fits her body. She has both CSD and district-provided teachers, but her parents believe that it is only a matter of time before CSD tries to push her out again—as the school administrators continue to do with other similarly situated multi-disabled children. Parent of Holly P. Interview, *supra* note 23.

33. This paragraph is a brief summary of what a special education lawyer might say. The application of the IDEA (and Section 504) to this context is explored in much greater detail in *infra* Part II.

34. Holly's parents were not the only parents harassed; parents of all multi-disabled children at CSD receive such treatment from the school and deaf community, and most of those students no longer attend CSD. Parent of Holly P. Interview, *supra* note 23.

35. Each school has a general admission policy outlined by the state legislature. *See* CAL. EDUC. CODE § 59020 (2005) (establishing the general policy for the California State Special Schools for the Deaf); CAL. EDUC. CODE § 59120 (2005) (setting forth the general policy for the California State Special School for the Blind). Furthermore, Section 5210 of the California Department of Education's Specialized Programs Branch Administrative Manual describes a more detailed admission policy for the state special schools. The Manual states that the following individuals cannot be admitted to the schools:

> 1. Those in need of a 24-hour psychiatric treatment program . . . .
> 2. Those developmentally delayed individuals who require a custodial program. Characteristics include: severe retardation, lack of self-help skills, or in need of one-to-one supervision. (Self-help skills include: ability to learn simple mobility patterns around campus, communicate basic needs to staff members, respond appropriately to life threatening situations, and function in a group setting; and demonstration of the potential to eat and dress without assistance and otherwise tend to personal care needs.)
> 3. Those with severe acting out/aggressive behaviors . . . . Characteristics include: danger to self or others, assaultive, repeated contacts with law enforcement agencies, or in need of one-to-one supervision. . . .

CAL. EDUC. DEP'T, SPBA MANUAL § 5210 (2004).

students who also have developmental delays or other mental or emotional disabilities—like Holly—can be and are being excluded by the California state special schools. Although the details of each individual case differ, school administrators base these rejections on the schools' mission statements and their explicit admission policies. As Holly's story indicates, school administrators in California reach beyond these formal exclusionary principles to push out multi-disabled children through informal or unwritten policies and practices.

B. *Looking Beyond California: A State-by-State Survey of State Special Schools' Admission Policies and Practices*

As Part I.A illustrates, the California state special schools exclude multi-disabled students, but what about special schools in other states? This Part presents the general findings of a state-by-state survey,[36] which illustrates the varying trends in state special school admission practices from twenty-nine states and the District of Columbia.[37] This survey reveals that states take very different approaches to state special school management and organization. Admission policies for state special schools also differ greatly by state—though many states exclude multi-disabled students. The Appendix includes more detailed information on each state surveyed.

The states surveyed can be roughly divided into five categories or models, with an additional noncategory[38] for the states that do not have state special schools:

1. *Embracing Multi-Disabled Model* (seven states): statutory or regulatory framework of state special schools explicitly accepts multi-disabled students for admission;

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36. This state-by-state survey was undertaken in conjunction with the Stanford Youth Education Law Project and as part of my master's thesis at the Kennedy School of Government. *See* Walker, *supra* note 11, at 12-20 & app. B. Thanks to Stanford undergrads Dung Le and Matthew Schwieger, who helped with the state-by-state surveying.

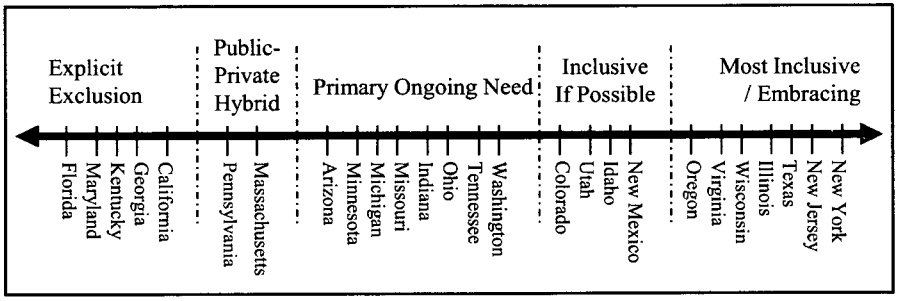
37. The state-by-state analysis was conducted via interviews; surveys; and statutory, common law, and regulatory research on state special school admission policies and practices. States were selected based on demographic similarity with and/or geographic proximity to California. The following twenty-nine states were evaluated (along with the District of Columbia): Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *See infra* Appendix for a brief summary of the special school systems used in each state.

38. Connecticut, the District of Columbia (D.C.), Nevada, and New Hampshire were included in the survey, although none had state special schools. Connecticut, D.C., and New Hampshire have private special schools for the blind and/or deaf, while Nevada does not have any special schools. Further information on all states surveyed can be found in the Appendix, *infra*, and Walker, *supra* note 11, at 12-20.

2. *Including If Recommended/Capacity Available Model* (four states): statutory or regulatory framework allows multi-disabled students to attend if recommended by IEP and school has capacity;
3. *Primary Ongoing Need Model* (eight states): framework places some limit on multi-disabled students—e.g., that hearing/seeing impairment be "primary ongoing need"—such that in practice these students are typically excluded;
4. *Public-Private Hybrid Model* (two states): framework aims at sending multi-disabled students to private special schools, excluding them from state special schools; and
5. *Explicit Exclusion Model* (five states): statutory framework explicitly excludes multi-disabled students from admission to state special schools.

It is important to note that these are rough categorizations, and great variation in process and substance may exist between states within a given category. These categories, which are represented graphically in Figure 1, merit further description in this Part (as well as in the Appendix).

Figure 1. State Special School Admissions Continuum for States Surveyed



NOTE: Connecticut, the District of Columbia, Nevada, and New Hampshire do not have state special schools.

1. *Embracing Multi-Disabled Model*

Seven of the states surveyed—Illinois, New Jersey, New York, Oregon, Texas, Virginia, and Wisconsin—fall within the "embracing multi-disabled" model.[39] These states explicitly include multi-disabled students in their statutory or regulatory admission framework. Each state takes a different approach. For instance, Illinois and New Jersey provide special education programming at each school and specifically allow multi-disabled students in admission standards. Alternatively, New York takes a public-private hybrid approach, in which "pure" blind or deaf students are encouraged to go to the private special schools, while multi-disabled students actually have preferred

39. For more information on these states, see *infra* Appendix and Walker, *supra* note 11, at 13-15 (including an extended case study on the Texas state special schools).

admittance into the state special schools.[40]

Of the seven "embracing multi-disabled" states, Texas appears to be the "best practices" model. The Texas legislature and state board of education interpret Section 504 as applicable to state special schools, and consequently, they do not discriminate against multi-disabled students in their admission policies.[41] Interviews with parents and advocates overwhelmingly point out Texas as the ideal example of a state with fully inclusive state special schools, specifically because its admission policies take into account both the IDEA's FAPE considerations and Section 504's equal treatment provisions. In addition, these policies are not just lip service: what is written is also put into practice.

2. *Including If Recommended/Capacity Available Model*

Four states—Colorado, Idaho, New Mexico, and Utah—also embrace multi-disabled students in state special schools, as long as the students are recommended by their home districts through the IEP process *and* as long as the schools have the capacity to accommodate them.[42] The statutory/regulatory admission standards are virtually identical to those of the "embracing multi-disabled" states, but these states are somewhat less inclusive because of the small size of the states and the consequent capacity constraints of the schools. As New Mexico's policy illustrates,[43] these states generally strive to include all multi-disabled students, but they will not be admitted if accommodating them exhausts resources.[44]

3. *Primary Ongoing Need Model*

This middle-ground category of "primary ongoing need" includes eight states: Arizona, Indiana, Michigan, Minnesota, Missouri, Ohio, Tennessee, and

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40. From a "least restrictive environment" (LRE) perspective, arguably New York might be less "inclusive," since they attempt to segregate "pure" blind and deaf students from those who are multi-disabled.

41. The Texas School for the Blind and Visually Impaired (TSBVI) admission policies are virtually the same as those of Texas School for the Deaf. Both schools explicitly utilize Section 504's antidiscrimination language in their admission statements. *See* TSBVI Equal Educational Opportunities, *Section 504 Handicapped Students*, http://www.tsbvi.edu/policy/fb.htm (basing policy on 29 U.S.C. § 794 (2006); 42 U.S.C. § 12132 (2006); 34 C.F.R. 104.4(a) (2006)).

42. For more information on these states, see *infra* Appendix and Walker, *supra* note 11, at 15-16 (including an extended case study on the New Mexico state special schools).

43. N.M. SCH. FOR BLIND & VISUALLY IMPAIRED (NMSBVI), NMSBVI POLICY Nos. 500, 508, *available at* http://www.nmsvh.k12.nm.us/P&P/508%20Qualifying%20Criteria%20for%20Outreach%20Itinerant%20Services.doc (last visited Mar. 5, 2006).

44. Based on the interview responses of parents and advocates, Idaho's program merits additional praise. Many of those interviewed placed Texas and Idaho in the same class with respect to including multi-disabled students. The Idaho State Special School for the Blind reaches out to all blind students in the state. *See infra* Appendix; Walker, *supra* note 11, at 16-17 (including an extended case study on the Idaho state special schools).

Washington. Washington typifies this category: the admission standards do not exclude multi-disabled students, but they allow schools to exclude based on emotional or mental disability if administrators deem that the needs related to the additional disability outweigh the needs of the student's hearing or seeing disabilities.[45] So, in practice, multi-disabled students can be and—as uncovered through interviews with parents and advocates—usually are excluded from state special schools in states that employ this model.

That said, each state's policy differs dramatically in this category. For instance, Ohio and Tennessee allow state special schools to exclude students based on their inability to "function in a social setting" or their physical or social immaturity, while Michigan, Minnesota, and Washington exclude students whose "primary ongoing need" is something other than a hearing or seeing impairment.[46] Multi-disabled students *may* be included, but research and interviews have suggested that they are often excluded in practice.

4. *Public-Private Hybrid Model*

The public-private hybrid model encompasses states that have both public and private schools for blind and deaf students, but the states pay for multi-disabled students to attend private alternatives (thus, the states exclude them from state-sponsored schools). Many states have private special schools, but two states—Massachusetts and Pennsylvania—clearly fall within this public-private hybrid category because they aim to send multi-disabled students to private schools.[47] New York is perhaps the most complex hybrid; it is not only in this category but also in the most embracing category because the New York state special schools do not exclude multi-disabled students, but actually prefer them over "pure" blind or deaf students.[48] Conversely, Massachusetts and Pennsylvania try to exclude multi-disabled students from the state-sponsored schools and alternatively place them in private special schools. For instance, Massachusetts is the home of various public and private special schools, and the general trend is to place multi-disabled students in private alternatives. Likewise, Pennsylvania explicitly funds private placements for multi-disabled students.[49] This hybrid category is a step removed from the "explicit

45. WASH. SCH. FOR DEAF, ADMISSION POLICY FOR NEW & FORMER STUDENTS, Policy 3000 (on file with author).

46. For more information on these states, see *infra* Appendix and Walker, *supra* note 11, at 16-17 (including an extended case study on the Washington state special schools).

47. For more information on these states, see *infra* Appendix and Walker, *supra* note 11, at 17-18 (including an extended case study on the New York state special schools).

48. For a list of state-operated, state-supported, and state-approved private and special schools for individuals with disabilities in New York, see Vocational and Educational Services for Individuals with Disabilities, Approved Private, Special Act, State Operated, and State Supported Schools, http://www.vesid.nysed.gov/specialed/privateschools/ (last visited Apr. 5, 2006).

49. However, interviews revealed that, in practice, Pennsylvania administrators believe

exclusion" model because the state attempts to place these students in private alternatives, instead of in their home districts.

5. *Explicit Exclusion Model*

The last group of five states—California, Florida, Georgia, Kentucky, and Maryland—explicitly excludes multi-disabled students from state special schools.[50] Florida is a perfect example; its admission standards exclude both trainable mentally handicapped and profoundly mentally handicapped students.[51] Although the admission standards might allow some multi-disabled students to attend the Kentucky School for the Blind (KSB), court records indicate that, in practice, most are excluded.[52] For instance, federal district court records reveal that KSB excludes blind students with mental retardation because the admission standards were "designed for those visually handicapped who would be classified at least as 'trainable' mentally handicapped."[53] Many of the other states in this exclusionary category, such as California and Florida, have explicit admission policies that exclude multi-disabled students.

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This state-by-state survey sheds light on current practices and policies of various states and offers useful comparisons to the California state special school system. One of the most compelling findings of the state-by-state survey concerns the disconnect between policy and practice: what most state special schools say they do and what they actually do differs dramatically.[54] This

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that multi-disabled blind and deaf students are best served in private alternatives.

50. For more information on these states, see *infra* Appendix and Walker, *supra* note 11, at 18-19 (including an extended case study on the Florida state special schools). *See also supra* Part I.A and notes 24, 35 (describing the policies and practices at the California State Special Schools for the Blind and Deaf).

51. Florida School for the Blind and Deaf (FSBD) eligibility, set by the FSBD Board of Trustees, targets children "whose primary disability is either a hearing impairment or a visual impairment," while excluding most multi-disabled students. For instance, a child is not eligible for admittance if she is "severely emotionally disturbed . . . trainable mentally handicapped (TMH) (unless student is dual sensory impaired)" or "profoundly mentally handicapped." FSDB GENERAL CRITERIA FOR ADMISSION AND CONTINUED ENROLLMENT (basing the admissions policy on FLA. ADMIN. CODE ANN. r. 6D-3.002 (2004)), *available at* http://www.fsdb.k12.fl.us/parent_information/enrollment_criteria.php (last visited Apr. 6, 2006).

52. Evidence of explicit exclusion was drawn from the state code and regulations concerning admission standards, as well as from interviews with practitioners and public officials and an examination of court records.

53. *See, e.g.*, Eva N. v. Brock, 741 F. Supp. 626, 632 (E.D. Ky. 1990).

54. Two main instances illustrate this ambiguity. First, interviews and surveys of experts and state special school administrators revealed that many schools do not make their admission policies public; many decisions are made on a confidential, case-by-case basis. Many interviewees were hesitant to state that they denied multi-disabled students based on additional disabilities. Instead, they stated other bases for their decisions—i.e., capacity

finding is particularly important to applying the legal principles discussed in the next Part: in particular, proving that a school provides a FAPE under the IDEA or proving discrimination on the basis of disability under Section 504 often requires the parents to confirm whether written school policies are indeed implemented in practice as written.

Most importantly, this state-by-state survey uncovers a troubling inequality among states with respect to their treatment of multi-disabled blind and deaf students. As further illustrated in the Appendix, some states embrace these students in their state special schools, while others explicitly exclude them; most lie somewhere in between on this continuum, and anecdotal evidence indicates that many of those in-between state special schools (i.e., the primary ongoing need model) exclude these students in practice—even if admission policies state differently. This unequal treatment among states illustrates a "circuit split" of sorts, which merits closer scrutiny in order to equalize treatment not just among states in how they administer state special schools but also between the pure blind and deaf students and their multi-disabled peers. The fact that states differ so dramatically in their state special school admission policies and practices only underscores the importance of understanding the rights of multi-disabled blind and deaf students and the responsibilities of state special schools nationwide under federal law. Part II embarks on this task.

II. THE LEGAL PRINCIPLES: THE IDEA AND SECTION 504 IN THE STATE SPECIAL SCHOOL CONTEXT

Now that the policy environment at the state special schools nationwide has been detailed, this Part explores the legal principles at play under federal law. To simplify the analysis, this Part uses the California state special school context (and the story of Holly P.) as the lens through which to view the legal tools available for students with special needs. As mentioned in the Introduction, two main legal frameworks apply to multi-disabled students and public schools: the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (Section 504).[55] The IDEA and Section

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constraints, inability to provide a FAPE, and so forth. Consequently, it was difficult to reach firm conclusions about admission practices. Second, many states have criteria that include some consideration of additional disabilities, but they do not explicitly exclude all multi-disabled students. Thus, the official policy is that they include multi-disabled students, but in practice, they exclude most if not all. Once again, not all interviewees were forthcoming about their admission practices—often contradicting written policies, facts developed in litigation, or others comments. In many states, explicit policies of nondiscrimination are not actually practiced. That leads one to question whether other states that claim inclusion actually do include multi-disabled students in practice. *See infra* Appendix; Walker, *supra* note 11, at 12-20.

55. A third legal tool, the Americans with Disabilities Act of 1990 (ADA), is also relevant to this discussion, but the ADA basically expands Section 504 to private schools that do not receive federal funding. 28 C.F.R. § 36.203(a) (2006); *see also* Sanchez v. Johnson, 416 F.3d 1051, 1062 (2005) ("Both the ADA and § 504 prohibit discrimination on

504 offer two distinct yet complementary standards to ensure that children with disabilities receive appropriate education. While the IDEA focuses on *adequate access* to a FAPE, Section 504 emphasizes *equal treatment* within federally funded educational programs.

As further discussed in the following Parts, legal challenges to the state special schools' admission decisions nationwide have typically been brought under the IDEA, and most IDEA challenges have been unsuccessful. However, Section 504 also provides grounds for suit, although its application to state special schools is an issue of first impression for the Ninth Circuit and California state courts (and most other states and circuits nationwide). Neither standard taken alone addresses the legal and policy principles at play with multi-disabled students and state special schools. Instead, special education attorneys and advocates must understand both legal frameworks and their interaction to better comprehend the underlying principles and policy rationales. In Part II.A, the classic IDEA claim will be presented, while Part II.B will introduce the complementary (and less utilized) Section 504 claim.

A. *The Classic IDEA Claim: A Federal Mandate To Provide Adequate Access to a FAPE*

Congress first addressed the issue of special education when it amended the Primary and Secondary Education Act of 1965 and added a special grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children."[56] Initial efforts to encourage states to educate special needs students failed, and in 1975, Congress found that the majority of disabled students were "either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out."[57] Consequently,

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the basis of disability in the administration of a public program receiving Federal funding."). It is also important to note that the ADA and Section 504 utilize the same eligibility requirements. *See* Barnes v. Gorman, 536 U.S. 181, 184-85 (2002); *Sanchez*, 416 F.3d at 1062. *See generally* PERRY ZIRKEL & STEVEN ALEMAN, SECTION 504, THE ADA AND THE SCHOOLS 1:5 (2d ed. 2000).

56. Pub. L. No. 89-750, § 161, 80 Stat. 1204 (1966) (repealed 1970). In 1970, Congress repealed this grant program and replaced it with the Education of the Handicapped Act, Pub. L. No. 91-230, pt. B, 84 Stat. 175 (1970), which instituted a similar grant program. However, as the Supreme Court noted, neither legislation "contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped." Bd. of Educ. v. Rowley, 458 U.S. 176, 180 (1982).

57. H.R. REP. NO. 94-332, at 2 (1975). The *Rowley* Court confirmed, 458 U.S. at 180 n.2, and the Senate noted that the 1975 enactment of the IDEA "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. REP. NO. 94-168, at 6 n.14 (1975). These two cases were *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972).

Congress passed the Education for All Handicapped Children Act in 1975,[58] later renamed the Individuals with Disabilities Education Act (IDEA),[59] in an effort to address the educational needs of children with disabilities. As the *Schaffer* Court noted this Term, the "IDEA was intended to reverse this history of neglect. As of 2003, the [IDEA] governed the provision of special education services to nearly 7 million children across the country."[60]

Under the IDEA, students with disabilities have the right to a free appropriate public education (FAPE).[61] The term "free appropriate public education" requires that special education and related services are made available to the student in the least restrictive environment (LRE); that is, children are entitled to receive these services and should receive that education with their nondisabled peers to the maximum extent appropriate.[62] The FAPE services must meet state educational standards, be free of charge, and comply with the student's individualized education program (IEP).[63]

The IDEA not only provides the substantive right to a FAPE, but it also grants parents and nonminor children procedural protections to enforce those rights. Specifically, the IDEA requires parental consent and involvement in decisions affecting a child's IEP.[64] Equally important, the U.S. Department of

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58. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

59. 20 U.S.C. §§ 1400-1420 (2006); 34 C.F.R. §§ 4000.340-.350 (2006).

60. Schaffer v. Weast, 126 S. Ct. 528, 531 (2005) (citing OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., DATA ANALYSIS SYSTEM tbl.27 (rev. July 31, 2004), *available at* http://www.ideadata.org/tables27th/ar_aa9.htm (last visited Mar. 15, 2006)).

61. 20 U.S.C. §§ 1400, 1401 (2006); *see also* CAL. EDUC. CODE § 56000 (2006).

62. *See* 20 U.S.C. § 1412(5)(B) (2006); *see also* Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1403 (9th Cir. 1994) (upholding "Congress's preference for educating children with disabilities in regular classrooms with their peers" in the IDEA). *But see* Bd. of Educ. v. Rowley, 458 U.S. 176, 181 n.4 (1982) ("Despite preferences for 'mainstreaming' handicapped children—educating them with nonhandicapped children—Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children.").

63. 20 U.S.C. § 1401(a)(18) (2006). A report published by the Stanford Youth Education Law Project provides a very helpful summary of the IDEA and the IEP process:

> The IEP—a document that sets forth the instruction and services that a child will receive for up to a year—is an essential component of the special education process. Creating the IEP is a team effort among parents, student (if appropriate), teachers, evaluators, and administrators. This team jointly considers all information regarding the child's present levels of performance, including work samples, evaluations, and observations; develops goals and objectives for the child to meet in the upcoming year; and determines appropriate services and placement in the LRE in which the child will attain the goals and objectives. Ideally, this process is completed with mutual respect and maximum cooperation in the student's best interests.

STANFORD YOUTH EDUC. LAW PROJECT, CHALLENGE AND OPPORTUNITY: AN ANALYSIS OF CHAPTER 26.5 AND THE SYSTEM FOR DELIVERING MENTAL HEALTH SERVICES TO SPECIAL EDUCATION STUDENTS IN CALIFORNIA (2004), http://www.law.stanford.edu/clinics/yelc/YELP_Chapter_26-5_Report_May_20.pdf.

64. 20 U.S.C. § 1414(a)(1)(D) (2006) (describing parental consent); 34 C.F.R. § 300.345 (2006) (outlining schools' duties to obtain parental consent and keep parents informed). These procedural protections are infused in a ten-step IDEA process, as outlined

Education outlines four actions that parents can take if they do not agree with the school's recommendations about eligibility, evaluation, placement, or services: (1) try to reach an agreement; (2) ask for mediation; (3) ask for due process; or (4) file a compliance complaint with the state education agency (SEA).[65] The third option, "an impartial due process hearing,"[66] was the subject of the Court's decision in *Schaffer*.[67] It is also the option most important for the context at hand because an IDEA challenge of the California state special schools' admission practices would likely take the form of a due process hearing.[68] The elements of the IDEA are outlined below, as applicable to the state special school context.

1. *Eligibility for IDEA services*

To be eligible for services under the IDEA, a child must be between the ages of three and twenty-one and be identified as having one or more disabling conditions.[69] The qualifying conditions must further adversely affect the

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by the U.S. Department of Education:

Step 1. Child is identified as possibly needing special education and related services.
Step 2. Child is evaluated.
Step 3. Eligibility is decided.
Step 4. Child is found eligible for services.
Step 5. IEP meeting is scheduled.
Step 6. IEP meeting is held and the IEP is written.
Step 7. Services are provided.
Step 8. Progress is measured and reported to parents.
Step 9. IEP is reviewed.
Step 10. Child is reevaluated.

OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 2-4 (2000) [hereinafter IEP GUIDE], *available at* http://www.ed.gov/parents/needs/speced/iepguide/index.html. For general advice to parents navigating the IEP process, see Stephen A. Rosenbaum, *When It's Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities*, 5 U.C. DAVIS J. JUV. L. & POL'Y 159 (2001).

65. IEP GUIDE, *supra* note 64, at 15-16; *see also* 34 C.F.R. § 300.350(c) (2006) (discussing due process rights).

66. 20 U.S.C. § 1415(f)(1)(A) (2006).

67. Schaffer v. Weast, 126 S. Ct. 528, 531 (2005).

68. The fourth option—a compliance complaint to the SEA—would be an equally viable route for enforcement. For the purposes of this Note, the due process analysis should be sufficient because the parents would have to prove the same elements for the SEA compliance complaint. Additionally, this is the route taken by the parents of Holly P. *See* Parent of Holly P. Interview, *supra* note 23.

69. 20 U.S.C. § 1401(3)(A)(i) (2006) ("The term 'child with a disability' means a child—(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . ."); 34 C.F.R. § 300.7 (2006) (providing more detailed definitions); *see also* CAL. CODE REGS. tit. 5, § 3030 (2006).

student's educational performance and must require special education.[70] Ultimately, the IEP team (made up of qualified professionals and the child's parents) makes the actual determination of the eligibility for special education and related services based on assessment reports, observations of the student, and other information presented at the IEP team meeting. As was the case with Holly P., eligibility is not a hurdle for multi-disabled students at state special schools: "hearing impairments (including deafness)" and "visual impairments (including blindness)" are explicitly included within the statutory definition of a "child with a disability."[71]

2. *Special and related services provided*

A student who is found eligible for special education under the IDEA is entitled to certain "special and related services," as provided by Congress: services must be "provided at public expense, under public supervision and direction, and without charge . . . [and must] meet the standards of the State educational agency."[72] The *Rowley* Court has reinforced Congress's definition of special and related services by holding that the services must "confer some educational benefit upon the handicapped child"[73] and be "individually designed to provide educational benefit to the handicapped child."[74] The IDEA further defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability,"[75] and "related services" as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education."[76] Such related services can include speech and language services, auditory services, mental health counseling (individual, group, family), physical and occupational therapy, adaptive physical education, therapeutic recreation, rehabilitation counseling, health services (specialized health care plan), home or hospital instruction, specialized driving instruction, and social worker services—just to name a few.[77]

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70. 20 U.S.C. § 1401(3)(A)(ii) (2006).

71. *See* 20 U.S.C. § 1401(3)(A)(i) (2006); *see also* Parent of Holly P. Interview, *supra* note 23.

72. 20 U.S.C. § 1401(9) (2006) ("The term 'free appropriate public education' means special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program . . . ."); *see also* 34 C.F.R. § 300.8 (2006).

73. Bd. of Educ. v. Rowley, 458 U.S. 176, 197, 200 (1982).

74. *Id.* at 201.

75. 20 U.S.C. § 1401(29) (2006).

76. 20 U.S.C. § 1401(26)(A); *see also* 34 C.F.R. § 300.24 (2006).

77. *See* 34 C.F.R. § 300.24 (2006) (listing related services in more detail).

For multi-disabled blind and deaf students, such as Holly, these services would clearly include "speech-language pathology and audiology services,"[78] qualified personnel in both deaf/blind and special education,[79] and any other "instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings" that is needed for the child to receive a FAPE.[80] Consequently, establishing that a FAPE should include these services, *if identified as needed* for a FAPE, would not pose a significant hurdle. In fact, the U.S. Department of Education has issued explicit policy guidance on the services that deaf children require to receive a FAPE.[81]

3. *Extent of services required for a FAPE*

If the above two elements were the only necessary components of the IDEA analysis, multi-disabled students would have a strong claim that they should be admitted and receive services at the state special schools: these students are eligible for special education, and this special education should include the services they need in order to receive an adequate education.[82] However, the *Rowley* Court narrowly interpreted the definition of services required for a FAPE. Instead of accepting the lower court's definition of a FAPE as "an opportunity to achieve [] *full potential commensurate* with the opportunity provided to other children,"[83] the *Rowley* Court held that the FAPE standard requires that "*access* [] provided be sufficient to confer *some* educational benefit upon the handicapped child."[84] Furthermore, the Court in *Rowley* held that a student's IEP must be "reasonably calculated to enable the child to receive [some] educational benefits."[85]

The *Rowley* holding reveals a major reason why IDEA challenges fail, especially for multi-disabled students at state special schools: FAPE does not require that an IEP provide the *best* education possible or grant services that *maximize* the student's learning abilities. Instead, public schools must provide a "basic floor of opportunity," which includes "access to specialized instruction and related services which are individually designed to provide educational

78. 20 U.S.C. § 1401(26)(A) (2006).

79. 34 C.F.R. § 300.23 (2006).

80. 20 U.S.C. § 1401(29)(A) (2006).

81. *See* U.S. Department of Education, Deaf Students Education Services; Policy Guidance, 57 Fed. Reg. 49,274 (Oct. 30, 1992); *see also* Donald W. Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 WASH. U. L.Q. 213, 229 (1980) (presenting expert evidence on the "best method" for educating deaf students), *cited in* Bd. of Educ. v. Rowley, 458 U.S. 176, 207 n.29 (1982).

82. For the second critical part of the legal argument—whether the state special school or the local school has to provide the services—see *infra* Part II.A.4.

83. *Rowley*, 458 U.S. at 186 (emphasis added) (citing Rowley v. Bd. of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).

84. *Id.* at 200 (emphasis added).

85. *Id.* at 207.

benefit."[86] In other words, under the IDEA and the Court's interpretation in *Rowley*, schools must provide an appropriate educational program tailored to meet the student's unique needs. This program—which, depending on the IEP assessment, could include specialized educational and related services—must provide the student with *some* educational benefit and conform to the IEP.

Although state special schools may be able to provide a better (or the *best*) educational experience because they are uniquely equipped to deal with blind and deaf children, the California state special school administrators argue that local schools already provide adequate services to meet the FAPE requirement. They argue that the schools are designed to help a specific type of student—in particular, the "pure" blind or deaf student—and forcing the schools to serve multi-disabled students would frustrate their core mission and the quality of education provided to their students. Under the *Rowley* standard, it is very difficult for parents to show that the state special school is the *only* place their child can receive a FAPE. Consequently, the state special schools do not have to accept multi-disabled students. Furthermore, the Supreme Court in *Schaffer v. Weast* perhaps made it even more difficult for parents of multi-disabled students by holding that the burden of proving that a FAPE includes services not provided by the IEP is on the shoulders of the moving party,[87] in this case the parents of the multi-disabled students. In a post-*Schaffer* public school, proving that a child's IEP does not provide a FAPE is thus even more daunting.

4. *Agency responsible for providing a FAPE*

A second problem, specific to the state special school context, concerns state agency responsibility. The IDEA places the responsibility of providing special education and all related services in the IEP squarely on the local education agency (LEA), at no cost to the parent.[88] The LEA may provide those services through other agencies, nonprofit organizations, or private service providers, but the ultimate responsibility for provision of those services rests with the LEA. In other words, although the State of California, special education local plan areas (SELPAs), and LEAs may choose to provide services through arrangements with non-LEA providers—such as the California State Special Schools for the Blind and Deaf—the IDEA does not shift the mandate of providing those services to the non-LEA providers; rather, it remains with the LEA. If the LEA fails to provide appropriate special education and related services, the state educational agency (SEA)—in this case, the California Department of Education—is required to monitor and ensure provision of those services.[89]

86. *Id.* at 201.

87. Schaffer v. Weast, 126 S. Ct. 528, 536 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.").

88. 20 U.S.C. §§ 1401(22), 1414(d)(7)(A)(iii) (2006).

89. 20 U.S.C. § 1412; 34 C.F.R. § 300.300 (2006).

This unique relationship between the LEA and SEA arguably becomes even more complicated when a third state actor—i.e., the state special school—is included in the analysis. If a student is enrolled in a state special school for the blind or deaf, the LEA still has the legal mandate to provide a FAPE. Typically, the IEP team will meet to determine the services that are required to provide a FAPE and also the appropriate placement. If the IEP team decides that a state special school provides a FAPE—and the state special school confirms that it has the services to provide the particular student with a FAPE—then the student is placed at the state special school. The critical condition is that the state special school must agree to the placement.

Unfortunately, this condition is difficult to meet. Under the IDEA framework, most multi-disabled student requests for admission into California state special schools are unsuccessful.[90] The state special schools explicitly state in their admission standards that they cannot provide a FAPE for most multi-disabled students because the schools neither currently accommodate students with severe cognitive delays or other mental or emotional disabilities nor are they currently mandated by *state* law to provide these services.[91] So, these schools are not equipped with the specialized services needed to provide these students with a FAPE. In regular public schools (LEAs), this defense—that the school cannot provide a FAPE to these students because they do not have the appropriate specialized services—would never be persuasive. As the IDEA stipulates, LEAs must provide every student with a FAPE. If schools do not have the services available, they must either spend money to get them or fund placement at another facility that has them. However, because state special schools are not LEAs, but rather third-party state providers that tailor their missions and services to a specific subclass of students with disabilities, most IEP teams and courts have accepted this rationale.

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Consequently, because California state special schools explicitly exclude multi-disabled students, it would appear that the only way for multi-disabled students to prevail under the IDEA is to demonstrate that the LEA indeed cannot provide a FAPE, that the SEA must therefore directly provide a FAPE in the least restrictive environment, and that the only location at which such a FAPE can be provided is a state special school. Accordingly, the SEA must

90. For instance, in one Kelseyville School District case, Special Education Hearing Officer Mary Cote ruled that a multi-disabled blind student could not attend the California School for the Blind (CSD) in Fremont because he did not meet the admission qualifications, and thus, under the IDEA, CSD would not offer an appropriate placement for the student. *See* Student v. Kelseyville Unified Sch. Dist., Case No. 1298 (Cal. SEHO 1999); *see also* Student v. Fla. Sch. for Deaf & Blind, No. 95-4562E (Fl. Admin. Proceeding 1997) (finding that a blind student with other developmental delays did not meet special school admission qualifications and thus the school would not provide a FAPE), *reprinted in* 16 Individuals with Disabilities L. Rep. 1220 (1997).

91. *See supra* notes 24, 35 and accompanying text.

enroll the child in a state special school (and the state special school would be obligated to accept the student) in order for the child to derive some benefit from the educational program. Further, the LEA must fund the placement,[92] as well as provide for special education and related services that the state special schools do not currently provide.[93]

So, advocates for multi-disabled students have to look to educational practice and policy research in order to prevail under the IDEA. If local schools do not and cannot provide teachers with expertise in deaf or blind education, or do not and cannot provide access to the communicative technologies necessary for these students to benefit from their education, then arguably the placement would not provide a FAPE.[94] The IDEA's driving rationale of adequate access to FAPE comes into play: All students have a right to free appropriate public education. Although the state does not have to provide the *best* education possible, the IEP must be reasonably calculated to provide some adequate educational benefit. However, demonstrating school districts' inability to provide a FAPE is a daunting barrier for students like Holly P. How does Holly prove that no other public school in her district can provide a FAPE?[95] This burden of proof is arguably much more daunting in a post-*Schaffer* (and a post-2004 reauthorization) public school, where it is clear that the parents have the

92. It should be noted that most LEAs would support such placements, even if they are quite expensive, since they do not feel capable of providing a FAPE for these students. This was the case with Holly. *See* Parent of Holly P. Interview, *supra* note 23.

93. This argument has been successful in one instance in California. Hearing Officer Mary Cote found that a deaf student with developmental disabilities had "not had opportunities to develop the skills to the extent that he fully meets the criteria set forth in the 'Admissions Policy' for the state special schools." Student v. Petaluma City Elementary Sch., Case No. 1063 (Cal. SEHO 1999). To reach this conclusion, the school district claimed that "there [were] no programs in any of the counties surrounding Sonoma County that include all of the components" of FAPE. *Id.* Consequently, CSD was the only appropriate placement for the student, and the state special school had to make reasonably accommodate the student. *Id.*

94. For instance, perhaps expert testimony could demonstrate that ASL and other communicative services are necessary to provide a FAPE and that the state special school is the only provider of such services. Furthermore, California law requires that students who are visually impaired or "deaf or hard of hearing shall be taught by teachers whose professional preparation and credential authorization are specific to that impairment." *See* CAL. EDUC. CODE § 44265.5 (2005). So, if the local schools do not and cannot provide teachers who have expertise in deaf or blind education, the placement would arguably not meet the FAPE standard.

95. There are some creative IDEA arguments that could turn in favor of multi-disabled students. For instance, one special education hearing officer found that the multi-disabled student would have met state special school qualifications with respect to cognitive development if he had received a FAPE from the onset. This has been the only successful strategy (and only successful once) in California: demonstrate—through educational records and expert testimony—that the student meets the state special school's admission requirements (i.e., prove that the student is not too cognitively or behaviorally impaired to meet the admission standards). The alternative is to establish that local school districts cannot provide FAPE for multi-disabled blind and deaf students and that state special schools are the only existing means to provide FAPE. Neither is particularly easy to prove.

burden of proving that the status quo does not constitute a FAPE—i.e., that the current public school placement cannot provide a FAPE.

B. *The Complementary Section 504 Claim: A Federal Mandate To Provide Equal Treatment*

Because the IDEA poses particular problems in the post-*Schaffer* state special school, advocates for multi-disabled blind and deaf students should "mov[e] beyond the more visible wave of litigation under the [IDEA]" and focus on "a second, and broader, generation of cases affecting public schools"[96]—claims brought under Section 504 of the Rehabilitation Act (Section 504).[97] While the IDEA focuses on adequate access to FAPE, Section 504 emphasizes equal treatment and antidiscrimination.[98] As such, Section 504 "is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance"[99] and was created, in part, "to share with handicapped Americans the opportunities for an education."[100] This unprecedented, one-sentence civil rights provision found its way into the last section of the Rehabilitation Act of 1973:

> No *otherwise qualified individual with a disability* in the United States . . . shall, *solely* by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity* receiving Federal financial assistance . . . .[101]

Although the Rehabilitation Act was passed in 1973, it took another four years and a twenty-five-day sit-in at the San Francisco regional office of the U.S. Department of Health, Education, and Welfare—the longest such occupation ever of a federal building by political protestors—before Section 504's implementing regulations were promulgated in 1977.[102] Once the regulations were in place, Section 504 became a powerful tool for combating disability discrimination in employment, as well as in preschool, elementary, secondary, and postsecondary education.

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96. Perry A. Zirkel, *Section 504: The New Generation of Special Education Cases*, 85 Educ. L. Rep. (West) 601 (1993).

97. 29 U.S.C. § 794(a) (2006). *See generally* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FREE APPROPRIATE PUBLIC EDUCATION FOR STUDENTS WITH DISABILITIES: REQUIREMENTS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 (1999) [hereinafter OCR SECTION 504 GUIDE].

98. *See supra* note 13 (describing how equal treatment is different in the disability context than in other discrimination contexts).

99. 34 C.F.R. § 104.1 (2006) (stating the purpose of Section 504).

100. 123 CONG. REC. 13,515 (1977) (statement of Senator Humphrey).

101. 29 U.S.C. § 794(a) (2006) (emphasis added).

102. *See* 34 C.F.R. §§ 104.1-.61 (2006) (containing the current-day regulations for Section 504); *see also* PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 105-11 (2003) (describing the Section 504 sit-in of April 1977).

In contrast to the IDEA, Section 504 emphasizes equal treatment, not just access to FAPE.[103] In other words, the drafters of Section 504 were not only concerned with Holly receiving a FAPE somewhere (as was the case with the IDEA), but also that a federally funded program does not treat Holly differently because she is not "pure" deaf. Under Section 504, a state special school cannot hide behind the justification that another public school might provide a FAPE; it must show that somehow Holly does not qualify for admission. Unlike the IDEA, Section 504 does not only look at what is *FAPE*, but also what is *fair*.

Consequently, a Section 504 challenge would generally focus on how multi-disabled students are excluded from a state special school for which they would otherwise be qualified—due to either their blindness or hearing impairment—solely because of their additional disability. And, due to this unequal treatment, the argument would proceed, multi-disabled students receive significantly less adequate educational benefits. To understand whether current California state special schools' admission policies that exclude multi-disabled students violate Section 504, the statute's key terms must be understood. As will be demonstrated, this analysis provides a persuasive case that the status quo amounts to discrimination under Section 504, even though state and federal courts in California have yet to consider such claims.

1. *Eligibility, part I: individual with disability and major life activity*

Two key terms must be examined to determine if an individual is eligible for relief under Section 504: whether the person is an "individual with a disability" and whether the person is "otherwise qualified." For the purposes of discrimination in K-12 public education under Section 504, an "individual with a disability" is any person who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment."[104] In other words, courts must make three distinct inquiries to determine whether the person is considered an "individual with a disability" for Section 504 purposes. First, the individual must have a physical or mental impairment or—in the alternative—have a record of such impairment or be regarded by others as having such an impairment. So, the individual need not necessarily have an actual physical or mental impairment, but only a record or appearance of such.[105] Second, the impairment must limit a major life activity.

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103. While Congress passed Section 504 only two years after the IDEA, Congress did not intend it to replace the IDEA, nor did it intentionally purport to supplement the Act. For further discussion, see *infra* Part III & tbl.1.

104. 29 U.S.C. § 705(20)(B) (2006); *see also* 34 C.F.R. § 104.3(j) (2006) (providing same definition).

105. The way this language has been parsed might seem counterintuitive. Subsections (ii) and (iii) do not include the language "substantially limits one or more . . . major life activities." However, these subsections require a record or appearance of "*such* impairment," where "such" implies that the impairment would have to meet the second and third inquires

Finally, Section 504 quantifies this limitation: it must be substantial.

In other contexts, this standard has been difficult to meet and has resulted in controversial rulings by the Supreme Court.[106] However, with respect to Holly and other multi-disabled blind and deaf students at state special schools, there should be no controversy; the regulations explicitly include "seeing, hearing, . . . [and] learning" within the definition of "major life activities."[107] Consequently, advocates must only prove that blindness, deafness, or some other disability "substantially limits" these multi-disabled students' ability to see, hear, or learn.

2. *Eligibility, part II: otherwise qualified individual*

To be eligible for Section 504 relief, an individual with a disability must also prove that she is "otherwise qualified."[108] In the K-12 context, this should not be problematic. Section 504's implementing regulations define "qualified handicapped persons" as:

> [w]ith respect to public preschool, elementary, secondary, or adult education services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under [the IDEA] . . . .[109]

Under this definition, the typical multi-disabled blind or deaf student is eligible for relief under Section 504. Indeed, any public school-aged child is otherwise qualified.[110] The Section 504 regulations cast a very wide net for eligibility.

However, it should be noted that one court (and to date, the only court to address this issue) has deemed a multi-disabled student as not "otherwise

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of substantially limiting a major life activity. *See* 29 U.S.C. § 705(20)(B) (2006) (emphasis added).

106. *See, e.g.*, Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002) (holding that an employee's inability to do repetitive work with hands and arms due to carpal tunnel syndrome was not sufficient to prove that she was substantially limited in the major life activity of performing manual tasks); Murphy v. United Postal Serv., Inc., 527 U.S. 516 (1999) (holding that an employee's high blood pressure did not substantially limit his major life activities when he mitigated the impairment through medication); Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that HIV infection is a "disability," even when the infection has not yet progressed to the symptomatic phase, as a physical impairment that substantially limits the major life activity of reproduction); Sch. Bd. v. Arline, 480 U.S. 273 (1987) (reversing a lower court's decision that tuberculosis is not a disability that substantially limits the major life activity of working).

107. 34 C.F.R. § 104.3(j)(2)(ii) (2006) ("*Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.") (emphasis in original).

108. 29 U.S.C. § 794(a) (2006).

109. 34 C.F.R. § 104.3(l)(2) (2006).

110. OCR SECTION 504 GUIDE, *supra* note 97, at 3 ("In general, all school-age children who have disabilities are entitled to FAPE [under Section 504].").

qualified" under Section 504. In *Eva N. v. Brock*, a federal district court in Kentucky found that Timmy, a blind student with profound mental retardation, was not otherwise qualified because the Kentucky School for the Blind was "designed for those visually handicapped who would be classified at least as 'trainable' mentally handicapped. Unfortunately, Timmy's handicaps are far too profound for such a classification."[111] This situation appears to be the very definition of "otherwise qualified" in that, *but for* the student's additional disabilities, this multi-disabled blind student would have been accepted into the state special school for the blind. However, the district court ruled otherwise. Similar findings have been made in other contexts.[112]

Such arguments are also found in California administrative law decisions, but under IDEA challenges, not Section 504 actions. For instance, in one Kelseyville School District case, the special education hearing officer ruled that a multi-disabled blind student could not attend California School for the Deaf (CSD) because he did not meet the admission qualifications and because CSD would not offer an appropriate placement for the student.[113] The hearing officer emphasized behavioral problems, as well as the need for custodial placement, as the reasons why the student did not qualify for the school.[114] More importantly, the hearing officer remarked in a footnote:

> The Superintendent of Public Instruction determines the admission criteria to the CSDF. The Hearing Officer makes no finding as to whether the CSDF's admissions criteria were properly developed. The Hearing Officer notes that the posture of the California Department of Education through the Schools for the Deaf that it has no obligation to serve deaf children with disabilities unless mild, appears discriminatory. Both State and federal law preclude exclusion of individuals who, with reasonable modifications, including provision of auxiliary aides and services, meet essential eligibility requirements for participation in programs funded by the State.[115]

In other words, because this was an IDEA claim and not a Section 504 action, the hearing officer took the established admission criteria as the FAPE qualifications standard without evaluating whether the student was otherwise qualified under Section 504. In the opinion's footnote cited above, the hearing officer is seemingly calling for multi-disabled students to challenge CSD

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111. 741 F. Supp. 626, 632 (E.D. Ky. 1990). This case is strikingly similar to Holly P.'s case. CSD might argue that Holly is not "otherwise qualified" because she has additional disabilities that CSD cannot accommodate. In particular, CSD admission requirements disqualify "developmentally delayed individuals who require a custodial program. Characteristics include: severe retardation, lack of self-help skills, or in need of one-to-one supervision." CAL. DEP'T OF EDUC., SPBA MANUAL § 5210 (2004).

112. *See, e.g.*, Sch. Bd. v. Arline, 480 U.S. 273, 275 (1987) (finding that a teacher with tuberculosis was not otherwise qualified to teach students because her pupils had a significant risk of contracting the disease).

113. Student v. Kelseyville Unified Sch. Dist., Case No. 1298 (Cal. SEHO 1999).

114. Perhaps if this particular multi-disabled student did not have behavior problems, the hearing officer would have ruled differently.

115. *Kelseyville Unified*, Case No. 1298, at n.14 (referring explicitly to Section 504).

admission policies under Section 504. In California, no such child has filed a Section 504 action to date.

More importantly, the Kentucky challenge to the "otherwise qualified" requirement apparently overlooked (or ignored) the implementing regulations of Section 504,[116] which define "qualified handicapped persons" to include all students who qualify for K-12 education more generally.[117] Because Section 504 regulations cast a very wide net for eligibility, the typical multi-disabled blind or deaf student is clearly eligible for relief under Section 504.

3. *Any program or activity*

The next important term concerns "any program or activity." Similar to eligibility, Section 504 casts a very wide net with respect to programs and activities covered, including any "local educational agency . . . , system of vocational education, or other school system" that receives federal funding.[118] Consequently, Section 504 covers a broad scope of activities that clearly includes the activities of California state special schools.[119]

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116. *See Eva N.*, 741 F. Supp. 626. In fact, contrary to Section 504's legislative history and implementing regulations explained in this Part, the court concluded, "If the states' obligations to a child under the [IDEA] are met, Section 504 is also satisfied." *Id.* at 632. The court also focuses almost entirely on "reasonable accommodations," which are explored in further detail in Part II.B.4, *infra*.

117. 34 C.F.R. § 104.3(l)(2) (2006).

118. 29 U.S.C. § 794(b) (2006) ("For the purposes of this section, the term 'program or activity' means all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government; (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or (B) a local educational agency . . . , system of vocational education, or other school system; . . . any part of which is extended Federal financial assistance."); *see also* 34 C.F.R. § 104.3(k).

119. The issue of program scope should also be considered. For instance, the court could interpret the government program to be the school district or entire school system in California, and not the state special school in particular. This interpretation would be problematic for multi-disabled students because it would basically reduce the Section 504 claim to an IDEA claim, *see* supra Part II.A.4—thus making the issue whether the district provides a FAPE somewhere within its system, not whether the state school provides services (equal treatment). This interpretation, however, runs counter to the statutory text. In particular, "program" includes these larger state or local government systems (for instance, the statute includes "school system" as a program), as well as the "local educational agency." 29 U.S.C. § 794(b) (2006). Consequently, in the complaint, the challenger should frame the scope of equal treatment within the state special school, not within a district or the state system as a whole. This is an issue of first impression for California courts. Every jurisdiction that has opined on this issue has interpreted "any program or activity" as exclusively applying to the whole district, not individual state special schools.

4. *Reasonable accommodations or the OCR standard*

The final condition—that of the level of accommodation required—is perhaps the most controversial and widely debated Section 504 concept among practitioners, policymakers, and academics. There exist two divergent interpretations concerning the level of accommodations mandated by Section 504 in the K-12 public school context: the minority standard that emphasizes "reasonable accommodations" and the majority standard established by the U.S. Department of Education's Office of Civil Rights (OCR) and codified in Section 504's implementing regulations,[120] which emphasizes affirmative duties and FAPE and rejects the notion of a reasonable accommodations limitation to K-12 educational services.

In employment discrimination cases brought under Section 504, courts apply a limiting standard of "reasonable accommodations" to evaluate whether a business must accommodate individuals with disabilities.[121] This reasonable accommodations standard stipulates that accommodations should be made *unless* such changes result in "undue hardship" to the particular business, making such accommodations "unreasonable."[122] This standard has been confined primarily to the commercial context—indeed, it is not present in the Section 504 implementing regulations for K-12 education[123]—but some courts have extended it to the higher education context.[124]

Although the Supreme Court has generally applied this extension only to higher education institutions,[125] one district court case is particularly on point. In *Eva N. v. Brock*,[126] the same case discussed in Part II.B.2, a student who was

120. *See* 34 C.F.R. §§ 104.32-.35 (2006).

121. *See* 34 C.F.R. § 104.12 (outlining the reasonable accommodations standard for the commercial context). *See generally* Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423 (1991). Note that such a standard is not present in the regulations for K-12 public education. *See* 34 C.F.R. §§ 104.32-.35 (2006).

122. 34 C.F.R. § 104.12 (2006). Judge Calabresi of the Second Circuit provides one of the clearest descriptions of the reasonable accommodations and undue hardship standard in *Borkowski v. Valley Central School District*, 63 F.3d 131 (2d. Cir. 1995) (discussing accommodations for a library teacher in an elementary school).

123. *See* 34 C.F.R. §§ 104.31-.39 (2006). Section 104.33 mentions FAPE as the standard, and in no section is the term "reasonable accommodations" mentioned.

124. *See generally* David L. Dagley & Charles W. Evans, *The Reasonable Accommodation Standard for Section 504-Eligible Students*, 97 Educ. L. Rep. (West) 1 (1995) (detailing the history of the reasonable accommodations standard and its application in the educational arena).

125. *See* Alexander v. Choate, 469 U.S. 287 (1985) (applying reasonable accommodations to healthcare and vocational programs); Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979) (applying reasonable accommodations to admissions to a nursing program at a community college).

126. 741 F. Supp. 626 (E.D. Ky. 1990), *aff'd without opinion*, 943 F.2d 51 (6th Cir. 1991).

blind and profoundly mentally disabled sought admission to the Kentucky School for the Blind. To accommodate the student's mental disability, the school would have been required to alter its mission and programs and to hire additional faculty with qualifications beyond those usually required to teach students independent living skills. The district court determined that requiring the school to alter its programs to accommodate the student would not be reasonable.[127] To reach this decision, the court relied on questionable precedent from the employment context, as well as the higher education context, and did not discuss the fact that the reasonable accommodations standard purposefully does not appear in the Section 504 regulations for K-12 public schools.[128] Instead, the court seemed to ignore the regulations. The Sixth Circuit affirmed the decision without issuing an opinion.[129] This holding has not been extended to other cases with similar fact patterns, nor has any other circuit adopted this standard for special education in K-12 public schools.[130] Indeed, this issue is one of first impression for California courts.[131]

If the reasonable accommodations standard were applied to the K-12 context, the state special schools would have a very strong argument against admission of multi-disabled students because the schools would have to fundamentally alter their mission statements and services. Such modifications

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127. 741 F. Supp. at 632.

128. *Id.* at 632-33. To explain "[t]he evolution of the 'reasonable accommodation' corollary to Section 504," the court erroneously relied on *Wynne v. Tufts University School of Medicine*, No. 89-1670, 1990 U.S. App. LEXIS 6772 (1st Cir. Apr. 30, 1990), an unpublished opinion by the First Circuit. *Eva N.*, 741 F. Supp. at 632 n.5. First, the *Wynne* opinion dealt with medical school, not K-12 public schools; higher education is not excluded from the reasonable accommodations standard under the Section 504 regulations. Second, the First Circuit opinion cited was unpublished and later withdrawn. In the later published opinion, the court was more skeptical about whether the Tufts Medical School provided a reasonable accommodation, and the court's reasoning was more nuanced. *See* Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 28-29 (1st Cir. 1991). In sum, the district court's decision was based on a discarded opinion and a failure to distinguish the K-12 context from higher education.

129. Eva N. v. Brock, 943 F.2d 51 (6th Cir. 1991).

130. It would be more difficult to overturn the current admission practices at state special schools if the court applied the reasonable accommodations standard. To accommodate multi-disabled students, the California Schools for the Deaf and Blind would have to alter their mission and programs, as well as hire additional faculty that could offer one-on-one special training. The California fact pattern is strikingly similar to that found in the Kentucky case. *See Eva N.*, 741 F. Supp. 626.

131. Although California courts, to date, have not applied the reasonable accommodations standard to K-12 public education, if they do, the best way for advocates to combat this standard would be to focus on how the standard is used to help disabled students and to downplay the unreasonableness of the accommodations needed for multi-disabled students to attend state special schools. This balancing examination would weigh the costs and benefits of having these students in regular public schools versus state special schools. Several factors—including existing infrastructure to host multi-disabled blind and deaf students and the centralization of services for multi-disabled blind and deaf students—could cut in favor of placement at the state special schools.

would arguably be unreasonable and pose an undue burden on the schools.[132] The Third Circuit's decision in *Easley v. Snider*[133] would be strikingly on point if the reasonable accommodations standard was extended to the K-12 context. In *Easley*, multi-disabled adults brought a Section 504 action against the Pennsylvania Attendant Care Program because they were excluded from the program solely because they were not mentally alert. The program only admitted physically handicapped but mentally alert individuals.[134] The Third Circuit held that "the use of surrogates by the non-mentally alert physically disabled is not a reasonable modification of the Pennsylvania Care Services Act" and thus excluded the multi-disabled individuals from the federally funded program.[135]

Fortunately for Holly P. and other multi-disabled blind and deaf students, the reasonable accommodations standard constitutes the minority view in the K-12 public school context. The majority and more favorable standard for multi-disabled students is put forth by the U.S. Department of Education's Office for Civil Rights (OCR).[136] In a now-famous 1993 OCR response letter to Professor Perry A. Zirkel, the OCR reinforced its interpretation of Section 504 regulations for K-12 public schools:

> The key question in your letter is whether OCR reads into that Section 504 regulatory requirement for a free and appropriate public education (FAPE) a "reasonable accommodation" standard, or some similar limitation. The clear and unequivocal answer to that is no. Section 104.33(a) guarantees all qualified individuals with disabilities FAPE . . . .
>
> . . . Thus, I believe that the FAPE requirement in the Section 504 regulation does reflect congressional intent. Since that time there have been *no* actions by the Congress, the Federal Courts, or the agencies and administrative tribunals of the executive branch that would require OCR to modify § 104.33, or its interpretation thereof, to allow for some limitation of the FAPE guarantee.[137]

In essence, the OCR alternative excludes *any* accommodations limitation to Section 504 in the public school context because of the parallel doctrine of the IDEA—i.e., that all students must benefit from a FAPE regardless of what is

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132. *Cf.* U.S. Airways, Inc. v. Barnett, 527 U.S. 581 (2002) (holding that reassignment to another position, in violation of a company's seniority system, would pose an undue burden on the company).

133. 36 F.3d 297 (3d Cir. 1994).

134. *Id.* at 298.

135. *Id.* at 306.

136. OCR SECTION 504 GUIDE, *supra* note 97, at 2 ("The Section 504 regulation requires a school district to provide a 'free appropriate public education' (FAPE) to each qualified person with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the person's disability.").

137. Letter from the Office of Civil Rights, U.S. Dep't of Education, to Professor Perry A. Zirkel, Lehigh Univ. (Aug. 20, 1993), *reprinted in* 20 Individuals with Disabilities L. Rep. 134 (1993) [hereinafter OCR Zirkel Response Letter]. In this response letter, the OCR reviewed the congressional record, the regulatory promulgation process, and the Supreme Court cases cited in *supra* note 125.

reasonable. The OCR sets forth affirmative duties for public schools, which parallel those duties outlined under the IDEA, with respect to Section 504-eligible students.[138] The duties to provide a FAPE and residential placement go beyond "reasonable accommodations" in the commercial context.

As the OCR letter to Professor Zirkel indicates, the OCR explicitly rejects the reasonable accommodations standard for Section 504 public education claims. The driving rationale is that providing a FAPE at a public school, by definition, almost always requires "unreasonable accommodations."[139] It should be noted that commentators have heavily criticized the OCR standard—noting that it violates administrative lawmaking,[140] creates an unreasonable and unfunded mandate,[141] and calls for a musts better balance to be struck.[142] Notwithstanding, under the Section 504 implementing regulations and the OCR interpretation, K-12 public educational institutions must make whatever accommodations necessary to provide FAPE and cannot discriminate against an "otherwise qualified individual . . . solely by reason of her or his disability."[143] The OCR continues to stand behind this interpretation, and no administrative law challenges to the Section 504 regulations have been brought in state or federal courts.[144]

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138. These duties include: (1) a duty to identify and locate students with disabilities; (2) a duty to notify them of school's duty toward them; (3) a duty to evaluate them prior to placement decisions; (4) a duty to provide them with a FAPE; and (5) a duty to provide them with residential placement. 34 C.F.R. §§ 104.32-.35 (2006); *see also* Ralph E. Julnes, *OCR and the Affirmative Action Controversy: An Explanation*, 88 Educ. L. Rep. (West) 527 (1994) (outlining these duties and explaining why the reasonable accommodations standard is incorrect for the public school context).

139. OCR Zirkel Response Letter, *supra* note 137.

140. *See* Kristine L. Lingren, *The Demise of Reasonable Accommodations Under Section 504: Special Education, the Public Schools, and an Unfunded Mandate*, 1996 WIS. L. REV. 633, 677 ("Time will tell whether an OCR policy that may not be within its statutory authority adequately balances the competing needs within the public education system. At the very least, the failure of the OCR policy to provide an adequate yardstick for school administrators demands consideration and clarification."); Ronald D. Wenkart, *Section 504: A Reasonable Accommodation Standard or an Unfunded Mandate for Special Education*, 116 Educ. L. Rep. (West) 531, 546 (1997) ("OCR's singling out of school districts for the higher standard (free appropriate public education) and its rejection of the reasonable accommodation standard for school districts, is without judicial support and is not supported by the language, history or intent of section 504.").

141. *See generally* Lingren, *supra* note 140; Wenkart, *supra* note 140.

142. *See* Dagley & Evans, *supra* note 124, at 12 ("However, common ground can be found between these positions. The Reasonable Accommodation Standard, in itself, certainly does not support the position that school officials need only be neutral with regard to disabled students. Attempts at neutrality may breed indifference to the needs of disabled students, and indifference may foster discrimination. OCR's position is designed to remind school officials of the need, as educators, to constantly seek ways of addressing the individual needs of students. Education is, by its nature, experimental. Teachers are called upon to be both diagnostic and prescriptive at all times in designing and delivering educational programs.").

143. 29 U.S.C. § 794(b) (2006).

144. *See* Letter from Office of Civil Rights (OCR), U.S. Dep't of Educ., to Author,

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The Section 504 analysis is quite straightforward, though its application to the state special schools is far from clear because it is an issue of first impression in California and almost all other states (Kentucky excluded). In summary, a court must first evaluate whether the individual has a disability and whether she is otherwise qualified. In the state special school context, this determination should be uncontroversial; multi-disabled students are being excluded from the schools explicitly because they are disabled. Second, a court must evaluate whether the discrimination takes place in a program or activity receiving federal funding. In this case, the law explicitly includes all LEAs, school systems, vocational schools, and any department of the state that distributes educational assistance.[145] Third, the Section 504 standard evaluates whether these students receive "commensurate benefit" in their LEAs and, depending on the courts' interpretation of Section 504, whether the necessary changes to the state special schools would be considered "reasonable accommodations." The multi-disabled students' Section 504 claim would be extremely strong in California *unless* the court applied the reasonable accommodations restriction. If a court did require only reasonable accommodations in the public school context, this analysis would turn to a cost-benefit analysis.[146]

Consequently, Section 504 challenges would focus on how multi-disabled students are excluded from a state special school program for which they would otherwise be qualified—due to either their blindness or hearing impairment—*solely* because of their additional cognitive or emotional disability. And, as a result of this unequal treatment, the argument would proceed, multi-disabled students receive significantly less educational benefit in their local schools than they would in the state special school. In other words, Holly might be able to receive a FAPE (barely, or at least it would be hard to prove otherwise under the IDEA) in her local school placement, but she would receive a much better education in the state special school. Due to CSD's discrimination against her

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FOIA Request No. 06-00104-F (Nov. 29, 2005) (on file with author) (indicating that the OCR Zirkel Response Letter is still the OCR's official position with respect to Section 504 and K-12 public schools); *see also* Telephone Communications with OCR and the Office of General Counsel (OGC), U.S. Dep't of Educ. (Oct.-Nov. 2005) (notes on file with author). Thanks to Charles Hokanson, former OGC Chief of Staff (and my supervisor during a 2004 summer clerkship at OGC), for help with this FOIA request.

> Furthermore, Professor Zirkel concludes that the OCR interpretation is controlling law:
>
> The substantive issue for student services under Section 504 is not clearly settled. The problem is clouded by the confusing overlap with IDEA coverage, the deft side-stepping by OCR, and the lack of frequent, focused judicial analysis. Nevertheless, at this point, the commensurate opportunity standard, which was rejected under the IDEA, appears to be the most directly defensible answer under Section 504.

Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less than the IDEA?*, 106 Educ. L. Rep. (West) 471, 476-77 (1996) (citations omitted).

145. 29 U.S.C. § 794(b) (2006).

146. *See supra* note 131.

because of her additional disabilities, she is the victim of unequal treatment (in comparison to her "pure" deaf peers) by a federally funded institution. This case is a classic example of a Section 504 violation: federally funded schools cannot choose who they serve (and do not serve) based *solely* on disability.

As this Part illustrates, multi-disabled students should have a much stronger claim under Section 504 than under the IDEA because Section 504 mandates that no federally funded program discriminate based on disability. It not only evaluates whether the students receive adequate access to a FAPE, but it also looks specifically at the government program's discriminatory practices. If it does discriminate, the program must prove that it provides a commensurate opportunity elsewhere.

III. BEYOND STATE SPECIAL SCHOOLS: THE IDEA AND SECTION 504 IN A POST-*SCHAFFER* PUBLIC SCHOOL CONTEXT

Now that both the IDEA and Section 504 claims for multi-disabled blind and deaf students against state special schools have been presented, this Part looks beyond these findings in this context to better understand how to utilize the IDEA and Section 504 in post-*Schaffer* public schools generally. As evidenced in Part II, the overall comparison of the IDEA and Section 504 is complicated but important in that they often accomplish similar objectives, but by using different instruments and driving principles. This comparison has often been neglected (or at best treated "once over lightly"[147]) by policymakers and academics.[148] However, there has been some analysis. For instance, one court analogized that Section 504 is a "bludgeon to the IDEA's stiletto, protecting a broader swath of the population without describing a precise manner of compliance."[149] Another commentator noted that the "IDEA is like Crater Lake, and Section 504 is like the Okefenokee Swamp."[150] These philosophic differences explain why and how these legal tools have been applied differently and also allude to why they should be considered in tandem with respect to multi-disabled students and state special schools, as well as in other special education contexts.

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147. This phrase is used by H. RUTHERFORD TURNBULL, III, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES 19 (4th ed. 1993), when comparing the IDEA and Section 504.

148. Consider, for instance, five of the main treatises on special education (with number of pages dedicated to comparing the IDEA and Section 504 in parentheses): JOSEPH R. BOYLE, SPECIAL EDUCATION LAW WITH CASES 17-18 (2001) (two pages); TURNBULL, *supra* note 147, at 19-23 (five pages); PETER W.D. WRIGHT & PAMELA DARR WRIGHT, WRIGHTSLAW: SPECIAL EDUCATION LAW 262 (1999) (one page); MARK G. YUDOF ET AL., EDUCATION POLICY AND THE LAW 712-13 (4th ed. 1992) (two columns, one page total); ZIRKEL & ALEMAN, *supra* note 55, at app. 1 (eleven pages in appendix).

149. Weber v. Cranston Pub. Sch. Comm'n, 245 F. Supp. 2d 401, 406 (D.R.I. 2003).

150. PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS 1:5 (1st ed. 2000).

As explained in Part II.A, the IDEA was created in the 1970s in response to growing concerns that children with disabilities were not receiving free appropriate public education (FAPE). By the mid-1970s, public K-12 education had emerged within the policymaking arena as a universal right, to which America's future was guaranteed at least a FAPE. Granted, children are not guaranteed the *best* education available *under the IDEA*, but Congress had to establish a lower boundary so that all students received some level of benefit from public education. The IDEA's driving rationale is adequate access to a FAPE—with particular emphasis on children with disabilities.

Conversely, Section 504 combats discrimination against individuals with disabilities. While Section 504 emerged at roughly the same time as the IDEA and in response to generally the same issue—disparate treatment of individuals with disabilities—Congress was more concerned with equal treatment in federally funded programs, not adequate access to a FAPE. Consequently, Section 504 is as much a civil rights act as it is an equal-access-to-education statute.[151] One commentator clearly explains this rationale for Section 504:

> Physically and mentally handicapped citizens suffer more discrimination than any minority group in the nation. Society has historically separated handicapped citizens from the rest of the population by assuming that nothing can be done to help the handicapped. Non-handicapped Americans are generally insensitive to the difficulties faced by the handicapped and fail to realize the contributions that handicapped persons could make to society. These misconceptions have led to continuing discrimination against this large but forgotten segment of the population.[152]

Congress intended that the IDEA guarantee a FAPE for children with disabilities, but its intent behind Section 504 reached beyond FAPE to systemic reform, in that any program or activity funded by the federal government should not treat these individuals unequally based solely on their disabilities. This antidiscrimination statute protects individuals with disabilities from disparate treatment, while also reversing historical misperceptions about individuals with disabilities—thus lessening the social stigma. Therefore, the rationales of the IDEA and Section 504 differ greatly as do their standards and provisions. Table 1 provides a detailed comparison of these two legal tools.[153]

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151. *See* Charles E. Finn, Andrew J. Rotherham & Charles R. Hokanson, Jr., *Conclusion and Principles for Reform*, *in* RETHINKING SPECIAL EDUCATION, *supra* note 12, at 342 ("Section 504 of the Rehabilitation Act should be viewed as the guarantor of disabled youngsters' civil rights[, not the IDEA].").

152. Steven William Gerse, Note, *Mending the Rehabilitation Act of 1973*, 1982 U. ILL. L. REV. 701, 702 (citations omitted).

153. For more discussion on the comparison of the IDEA and Section 504, see Laurie de Bettencourt, *Understanding the Differences Between IDEA and Section 504*, 34 EXCEPTIONAL CHILD. 16 (2002); Thomas Guernsey, *The Education of All Handicapped Children Act, 42 U.S.C. § 1983, and Section 504 of the Rehabilitation Act of 1973*, 68 NEB. L. REV. 564 (1989); Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 Educ. L. Rep. (West) 629 (2003).

Table 1. Comparison of the IDEA and Section 504 for K-12 Education

	The IDEA	Section 504
Enacting Legislation	*Funding Statute*: long statute (~30 pages) with even longer regulations (~45 pages)	*Civil Rights Act*: short statute (<2 pages), medium-length regulations (9 pages)
Federal Funding	Provides a percentage of special education funding to states who comply	Does not provide any federal funding, but can bar all federal funding if statute is violated
Coverage	Applies to students from birth to twenty-one years old, prior to and in K-12 education	Applies to students in K-12 as well as in postsecondary education, employees, facilities, and extracurricular activities
Student-Specific Services	FAPE = special education + related services	FAPE = special education *or* regular education + related services
Substantive Standard	Reasonably calculated to provide some educational benefit	Commensurate opportunity (or reasonable accommodation)
Main Analysis	*Case-by-Case Student Analysis*: whether school provides a FAPE to individual child	*Program/Activity Analysis*: whether school/program discriminates based on disability
Agency Enforcement	Office of Special Education Programs (OSEP)	Office of Civil Rights (OCR)
Policy Letters	By OSEP	By OCR
Complaints / Compliance Reviews	OSEP reviews with loss of funding as ultimate sanction; published precedents not common, but case-by-case review	OCR reviews with loss of ALL federal funding as ultimate sanction; common precedents published
Underlying Principles	*Adequate Access*: state must provide all students a FAPE, but not necessarily the *best* education possible	*Equal Treatment*: students cannot be excluded from a federally funded program solely because of a disability

In addition to the substantive comparison between the IDEA and Section 504 outlined in Table 1 and further detailed in Part II, several useful empirical

comparisons have been undertaken.[154] For instance, one commentator found that parents in a variety of special education contexts won Section 504 cases 55.0% of the time,[155] as opposed to a general 45.7% success rate under the IDEA.[156] Thus, the commentator concluded:

> [T]o the large extent that Sec. 504 overlaps with the IDEA and that OCR accounts for the bulk of these rulings, filing a complaint with this agency not only offers easier access in terms of parent input but also better odds in terms of decision-making outcome than does the judicial [IDEA] avenue.[157]

If parents are more successful with Section 504 than the IDEA,[158] why aren't they used more frequently? For instance, in the California state special school context, parents of multi-disabled students have only brought IDEA challenges against the state special schools. Section 504 actions have not been brought, even though one special education hearing officer explicitly urged the parents to do so.[159] Perhaps Section 504's lack of use is due, in part, to the fact that it is a much blunter legal instrument, with less clear guidelines for evaluation, than the IDEA. Additionally, Section 504 looks at the government program as a whole and requires policy answers with respect to costs and benefits of programs offered by LEAs in comparison to those at the state special schools. This type of analysis might often require a collaborative effort and considerable resources. Conversely, IDEA challenges can be, and often are, taken on a case-by-case basis—evaluating whether the LEA can provide a FAPE and, if not, whether the special school provides a FAPE. As illustrated in Part II, these actions are easier to bring but also easier to lose.

Professor Tyce Palmaffy provides another potential rationale for why Section 504 did not have the same effect as the IDEA at its outset and why it continues to have a weaker effect today:

> [P]assing a civil rights law is one matter; enforcing it is another. [Section 504 of the] Rehabilitation Act gave disabled children certain rights, but not the funds to encourage and help schools to identify, evaluate, and serve all

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154. *See, e.g.*, MELINDA MALONEY & BRIAN SHENKER, THE CONTINUING EVALUATION OF SPECIAL EDUCATION LAW 1878 TO 1995 (1995); Zirkel, *supra* note 96; Perry A. Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 Educ. L. Rep. (West) 369 (1997) [hereinafter Zirkel, *An Empirical Overview*].

155. *See* Zirkel, *An Empirical Overview*, *supra* note 154, at 374 (analyzing 1117 Section 504 administrative decisions).

156. *See* MALONEY & SHENKER, *supra* note 154, at iii (evaluating court decisions under the IDEA).

157. Zirkel, *An Empirical Overview*, *supra* note 154, at 374 (internal citations omitted).

158. This comparison of empirical studies is for illustrative purposes only; in no way is it meant to demonstrate a statistically significant difference in success rates between the IDEA and Section 504.

159. *See* Student v. Kelseyville Unified Sch. Dist., Case No. 1298, n.14 (Cal. SEHO 1999); *see also supra* note 115 and accompanying text (quoting the hearing officer's footnote that calls for parents to file a Section 504 claim against the California State Special School for the Deaf).

> disabled children, or to set up the kinds of due process protections specified by the laws.[160]

Furthermore, recall that, while Congress passed Section 504 (in 1973) before the emergence of the IDEA (in 1975), Section 504 regulations were not promulgated until 1977—and even then not until after a twenty-five-day sit-in and significant public pressure from the disability rights community.[161] So while the IDEA is a well-funded and "well-regulated program,"[162] Section 504 may be less utilized in special education because it is a one-sentence, unfunded civil rights statute that struggled for years to even gain enforcement regulations. Perhaps special education attorneys and advocates merely do not understand Section 504 or the difference between Section 504 and the IDEA.[163]

This misunderstanding is arguably the driving reason for Section 504's absence in the state special school context, as well as its neglect in special education law more generally. While IDEA challenges to state special school admission decisions are commonplace, Section 504 actions have not been tried in California or in most other states. And they should be. IDEA claims are also almost uniformly unsuccessful in the state special school context (and empirically less successful overall).[164] Conversely, the Section 504 claim is potentially quite powerful in the state special school context and K-12 special education cases more generally—especially because the K-12 implementing regulations reject the reasonable accommodations standard used in other Section 504 contexts.[165] Most importantly, special education attorneys and advocates do not have to choose between Section 504 and the IDEA: they can and should bring both claims in unison. As demonstrated in Part II, these statutes focus on different principles (adequate access to FAPE versus equal treatment), but the principles and claims complement and reinforce each other. And both principles play an important role in special education today.

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160. Tyce Palmaffy, *The Evolution of the Federal Role*, *in* RETHINKING SPECIAL EDUCATION, *supra* note 12, at 5.

161. *See supra* note 102 and accompanying text (describing the emergence of Section 504).

162. Palmaffy, *supra* note 160, at 14.

163. One commentator explains that practitioners confuse the two statutes and do not understand their differences:

> Confusion between the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act in relation to K-12 students is not uncommon among both educators and attorneys. One of the frequent questions from practitioners concerns the similarities and differences between individualized education programs (IEPs) under the IDEA and the counterpart document for free appropriate public education (FAPE)—often called a "504 Plan"—under Section 504.

Perry A. Zirkel, *Comparison of IDEA IEP's and Sec. 504 Accommodations Plans*, 191 Educ. L. Rep. (West) 563, 563 (2004) (internal citations omitted).

164. *See supra* Part I.A (explaining why IDEA claims have been unsuccessful in the state special school context).

165. *See supra* Part I.B (describing the Section 504 claim in the state special school context).

CONCLUSION

Although the Supreme Court's decision in *Schaffer v. Weast*[166] was not particularly surprising, the majority's opinion—as well as the dissents and amicus briefs—illustrates the obstacles that parents must overcome when challenging a school's decision under the IDEA. Congress's 2004 IDEA reauthorization has arguably made the playing field even more unequal,[167] though final regulations have yet to be published. Furthermore, the state special school context illustrates how the IDEA often does not cover certain types of discrimination: the IDEA focuses on guaranteeing adequate access to a FAPE, when in many cases parents are just as concerned that their children were treated unequally—and that other children with similar needs might likewise face discriminatory practices. In those situations, such as the case of Holly P., the IDEA does not produce a satisfactory result.

However, as the state special school context illustrates in Part II, Section 504 is a powerful, though oft-neglected, complement to the IDEA if it is understood and applied correctly—clearly more powerful and effective than the IDEA alone. Whereas the IDEA focuses on *adequate access to FAPE*, Section 504 emphasizes *equal treatment* within federally funded programs. In the state special schools context, neither standard alone accurately depicts the principles at play; instead, we must understand both standards and how they interact to better understand how to address discriminatory practices that inhibit multi-disabled students from receiving a FAPE in a state special school. Special education attorneys should use both tools in the state special school context to reverse these exclusionary practices.

More generally, Section 504 is a powerful tool, and excellent complement to the IDEA, outside the state special school context. As one group of commentators notes, policymakers and attorneys should look beyond "today's 'one-size-fits-all' IDEA mandates and procedures" to use "Section 504 as a 'safety-net' to guard against discrimination."[168] This Note has sought to do just that—to help policymakers and attorneys better understand how to utilize both Section 504 and the IDEA in order to make sure that no child is left behind or otherwise excluded from educational opportunities solely on the basis of a disability. This understanding is particularly important for special education attorneys and advocates as they attempt to look beyond the IDEA in a post-*Schaffer* public school.

166. 126 S. Ct. 528 (2005).

167. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (amending 20 U.S.C. §§ 1400-1482 (2006)).

168. Finn et al., *supra* note 151, at 342.

APPENDIX: STATE-BY-STATE SURVEY RESULTS

To derive the findings presented in Part I.B, state special school systems in twenty-nine states and the District of Columbia were analyzed. With assistance from Dung Le and Matthew Schwieger, this information was compiled from publicly available legal, policy, and statutory materials, as well as from e-mail, telephone, and written correspondence with individuals in each state surveyed—including state education department officials, state special school administrators, parents of enrolled students, and special education attorneys and advocates. Some of these individuals asked not to be identified by name in this Note. This Appendix provides brief summaries—in alphabetical order with the model type in parentheses—for each of the states surveyed.[169]

1. *Arizona (primary ongoing need)*

Arizona operates state special schools on two campuses: the Arizona State Schools for the Deaf and the Blind (ASDB) in Tucson and the Phoenix Day School for the Deaf (PDSD).[170] Blind and deaf students are also served by five Regional Cooperative Programs in which ASDB staff work with local school districts to provide services to students in local schools. ASDB also provides resources to local school districts, state institutions, and other educational programs. A board of directors appointed by the governor oversees ASDB.

Arizona statutes and the state education department outline the general admission criteria for the state special schools: the child must be a resident of Arizona, within the ages of three to twenty-one years old, and sensory impaired.[171] However, some exclusions apply to residential placement at the Tucson Campus. Those who are "medically fragile, chronically ill, and severely emotionally disturbed" may not live in campus housing.[172]

Arizona lacks specific written policies on multi-disabled students' admission to state special schools, but the ASDB Interim Superintendent emphasized a sensory impairment as the primary disability: "Yes [we do allow cognitively disabled students], but not severe cases. The student's primary disability must be sensory."[173] Based on this criterion, a multi-disabled student's admission to ASDB depends on the determination made by a diagnosing team, and the student may very well be denied if her primary disability is nonsensory. ASDB's admission policy of multi-disabled children hinges on their primary disability diagnosis. Thus, Arizona's approach falls under the primary ongoing needs model, in which the student's primary need

169. See *supra* Part I.B for a more detailed explanation of admission criteria models. Unless otherwise noted, websites cited in this Appendix were last visited on April 6, 2006.

170. Arizona State Special Schools Website, http://www.asdb.state.az.us/.

171. ARIZ. REV. STAT. § 15-1343 (2004).

172. ADMISSION TO CAMPUS HOUSING—TUCSON CAMPUS, http://www.asdb.state.az.us/admission.html.

173. Interview with Doris Woltman, Interim Superintendent of ASDB (Nov. 2004).

must be sensory to be admitted to Arizona's state special schools.

2. *California (explicit exclusion)*

The California state education system operates three state public special schools for the blind and deaf. No private alternatives are in place for blind and deaf students in the state. The California Schools for the Deaf are located in Riverside and Fremont. Each school provides a comprehensive residential and nonresidential educational program composed of academic, nonacademic, and extracurricular activities.[174] There is only one state special school for the blind, which is also located in Fremont. The California School for the Blind is a statewide resource offering expertise in the low prevalence disabilities of visual impairment and deaf-blindness through innovative model programs, assessment, consultation and technical assistance, professional development, research and publications, advocacy, and outreach.[175]

Each school has a general admission policy outlined by the California legislature.[176] Although the schools have set criteria to admit students,[177] the California Department of Education's Specialized Programs Branch Administrative Manual states that certain individuals cannot be admitted, including "those developmentally delayed individuals who require a custodial program . . . [and those with] severe retardation, lack of self-help skills, or in need of one-to-one supervision."[178] Based on these admission policies, legal challenges, and interviews with parents and advocates, blind and deaf students who also have developmental delays or other mental or emotional disabilities can be and are being turned down by the California state special schools. Consequently, the California system falls under the explicit exclusion model.

3. *Colorado (inclusive if possible)*

Colorado has one state special school, the Colorado School for the Deaf and the Blind (CSDB).[179] The school serves students housed on campus and throughout the state with an outreach program. Admission is based on whether the school believes it can meet the needs of the student. State law and school policy appear to support admission of multi-disabled students if necessary.

CSDB's mission statement recognizes students who may be both deaf and blind,[180] and the enrollment guidelines state that "students with additional disabilities are also welcome to consider attending CSDB."[181] Despite these enrollment guidelines, CSDB's 2003-2004 Annual Report does not mention

174. California Schools for the Deaf Website, http://www.cde.ca.gov/sp/ss/sd/.
175. California School for the Blind Website, http://www.csb-cde.ca.gov/.
176. CAL. EDUC. CODE §§ 59020, 59120 (2004).
177. CAL. EDUC. DEP'T, SPBA MANUAL § 5210 (2004).
178. *Id.*
179. More on the Colorado state special schools is available at http://www.csdb.org.
180. CSDB MISSION STATEMENT, http://www.csdb.org/about/mission.html.
181. CSDB ENROLLMENT GUIDELINES, http://www.csdb.org/about/enrollment.html.

multi-disabled students in its detailed documentation. State law, which dictates portions of the Colorado Department of Education's policy, leaves CSDB with the option of denying admission based on "instruction impracticality."[182]

While CSDB's enrollment guidelines suggest that multi-disabled students may enroll at the school, state law could conceivably be used to discriminate against multi-disabled students; interviews with parents and advocates reinforced this intuition. The extent to which CSDB will admit some multi-disabled students if necessary or explicitly exclude others remains unclear. Consequently, the Colorado system is best categorized as inclusive if possible, but further research is needed to make more conclusive determinations.

4. *Connecticut (no state special schools)*

Connecticut does not offer public state special schools for the blind or deaf. Instead, it serves students through over forty private schools in the state.[183] Each private school is individually operated and sets its own admission criteria. The schools are supported by local district money and reimbursed with IDEA discretionary funds.[184]

5. *District of Columbia (no state special schools)*

The District of Columbia does not house state special schools for the blind or deaf, although the District does have specialized programs at public schools for both blind[185] and deaf[186] students. Several private schools for the blind and deaf are also available in the District, including the Kendall Demonstration Elementary School and the Model Secondary School for the Deaf, both of which are programs housed at and operated by Gallaudet University.[187]

6. *Florida (explicit exclusion)*

Florida's approach to state special schools typifies the explicit exclusion model. Florida operates one state special school, the Florida School for the Blind and Deaf (FSBD),[188] and sponsors the Tampa Bay Academy, a private charter school for deaf students with severe mental or emotional behavior

182. COLO. REV. STAT. § 22-80-109 (2004) ("Every blind and every deaf citizen of the state of Colorado under twenty-one years of age is eligible to receive an education in the school, unless such person has a physical or mental condition which would render his or her instruction impractical . . . .").

183. For a list of private special education programs approved by the Connecticut State Department of Education, see http://www.state.ct.us/sde/deps/special/Priv_SpEd_Progs.pdf.

184. Interview with Deborah Richards, Conn. Educ. Consultant (Nov. 2004).

185. Interview with Marilyn Griffin Clark, Supervisor of the D.C. Programs for Children and Youth Who Are Blind or Visually Impaired (Dec. 2004).

186. Interview with Jo Constance Bond, Supervisor of the D.C. Programs for Children and Youth Who Are Deaf or Hard of Hearing (Nov. 2004).

187. Gallaudet University Website, http://www.gallaudet.edu/.

188. Florida School for the Blind and Deaf Website, http://www.fsdb.k12.fl.us/.

problems.[189] One of the largest state special schools in the nation, FSBD is a state-supported boarding school for *eligible* visually and hearing-impaired students in preschool through twelfth grade. Its campus includes forty-two major buildings situated on seventy acres of land.

FSBD eligibility, set by the FSBD Board of Trustees, targets children "whose primary disability is either a hearing impairment or a visual impairment," while excluding most multi-disabled students.[190] For instance, a child is not eligible for admittance if he is "severely emotionally disturbed" or "trainable or profoundly mentally retarded."[191] FSDB's website (as well as interviews with advocates) confirms that the school is meant to serve "students whose abilities range from learning disabled to gifted,"[192] but not students with more severe disabilities who would inhibit the learning process.

7. *Georgia (explicit exclusion)*

Georgia has three state special schools: the Georgia Academy for the Blind (GAB),[193] the Georgia School for the Deaf (GSD),[194] and the Atlanta Area School for the Deaf (AASD).[195] GAB and GSD are residential schools, while AASD is a day school serving students from twenty-six counties surrounding the Atlanta metropolitan area. Admission to each school is similar in that students must be referred from their local school district in order for the admission process to begin. Once an IEP committee reviews a student's records, a placement decision is made.

GAB historically has offered a "Program for Multidisabled Students"[196] that focuses largely on adapting educational services to the students' individual needs. This program also includes meeting the emotional needs of students through frequent therapy. Admission to GAB appears open to all, especially with its specialized program for multi-disabled students. However, the school has only two students who are blind and cognitively disabled, and the multi-disabled program is being phased out.[197] The two schools for the deaf in Georgia require that the student's primary disability be deafness. GSD does not enroll multi-disabled students, and AASD currently serves only three cognitively disabled students. The admission policies for AASD stipulate that a student's primary disability be deafness.[198]

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189. Tampa Bay Academy Website, http://www.tampabay-academy.com/.

190. FSDB ENROLLMENT CRITERIA, http://www.fsdb.k12.fl.us/administrative_info/enrollment_criteria.php.

191. *Id.*

192. Overview of FSDB, http://www.fsdb.k12.fl.us/about/index.php.

193. Georgia Academy for the Blind (GAB) Website, http://www.gabmacon.org.

194. Georgia School for the Deaf Website, http://www.gsdweb.org.

195. Atlanta Area School for the Deaf Website, http://www.aasdweb.com.

196. *See* GAB Website, History, http://www.gabmacon.org/history.htm.

197. *See* Interview with GAB Administrator (Nov. 2004).

198. *See id.*; *see also* websites cited in *supra* notes 193-95.

Admission to Georgia's state special schools varies by school, and several appear to be able to accommodate multi-disabled students. State law places no standards in terms of admission policies, only definitions for disabilities. Similar to the California schools, it appears that GAB, GSD, and AASD choose whom they accommodate because of this policy omission. Ultimately, although they might accommodate multi-disabled students in principle, Georgia's special schools appear to explicitly exclude multi-disabled students in practice.

8. *Idaho (inclusive if possible)*

Idaho operates one state special school—the Idaho School for the Deaf and Blind (ISDB).[199] The school offers both residential and day-school programs for blind and deaf children throughout the state, including multi-disabled students and "embraces the philosophy that positive intellectual, social, emotional and physical development is the goal for *every* child who is visually impaired, deaf, or hard of hearing."[200] Although the school has limited resources and cannot accommodate all eligible students, it does enroll multi-disabled students so long as resources are available to accommodate them.[201] Interviews with advocates and parents of multi-disabled blind and deaf children indicated that Idaho has an extremely inclusive program, but that the school also faces resource constraints that make it impossible to admit all multi-disabled blind and deaf students in the state.

9. *Illinois (most inclusive / embracing)*

Illinois operates four state special schools: the Illinois School for the Deaf (ISD),[202] the Illinois School for the Visually Impaired (ISVI),[203] the Philip J. Rock Center and School,[204] and the Illinois Center for Rehabilitation and Education-Roosevelt Foundation. These residential and day-school state facilities provide comprehensive educational programs for students, as well as related services to local school districts and other state institutions. The Illinois Department of Human Services and each individual state special school together determine admission standards.[205]

General admission requirements for each school emphasize the individual and total needs of students. For example, the ISD Admissions Committee determines admission based on "the total needs of the student, ISD's ability to

199. Idaho School for the Deaf and Blind Website, http://www.isdb.state.id.us/.

200. *Id.* (emphasis added).

201. Interview with Gretchen Spooner, ISDB Dir. of Curriculum (Jan. 2005); *see also* Interviews with Advocates and Parents of Multi-Disabled Students (Nov. 2004).

202. Illinois School for the Deaf Website, http://www.morgan.k12.il.us/isd/.

203. Illinois School for the Visually Impaired Website, http://morgan.k12.il.us/isvi/homepage.htm.

204. Philip J. Rock Center Website, http://project-reach-illinois.org/prc_txt.html.

205. Interview with Barbara Sims, Project Director, Ill. State Bd. of Educ. (Nov. 2004). For general information about special education procedures, see ILL. ADMIN. CODE tit. 23, §§ 226.10 *et seq.* (2004).

write an appropriate IEP for the student, and available space at ISD."[206] The schools' general written admission policies do not accept or reject multi-disabled students. Explicit considerations made for multi-disabled students lie in the context of special education age/class size requirements, as outlined in the state administrative code.[207]

Therefore, state law explicitly includes multi-disabled students in state special schools. However, there also seems to be the practice of determining a primary disability,[208] although not a written policy. It is possible that multi-disabled students' needs may be inadequately met because they are kept in their local school districts due to a primary disability determination that keeps them from being "appropriately suited" for state special schools; its actual practices might lean toward a primary ongoing needs model.

10. *Indiana (primary ongoing need)*

Indiana has two special schools—the Indiana School for the Blind (ISB)[209] and the Indiana School for the Deaf (ISD).[210] State law requires that special education evaluations occur through a case conference committee, which ultimately decides whether a student is admitted to ISB or ISD. Each school has a board that determines admission criteria as mandated by state law.[211] ISD admission policies consider multi-disabled applicants as fully eligible so long as one of the disabilities is a hearing impairment.[212] Students rejected by ISD generally have a disability that deems their potential placement at ISD as "restrictive"; the committee makes this "restrictive" determination, reportedly due to the students' low cognitive functioning or emotional instability.[213]

Admission to ISB is similar to ISD, as students with cognitive disabilities have been denied admission on the basis that ISB would not adequately serve them. Despite state law requiring the ISB Board to include its admission policies in the state's administrative code, the policies are absent from the code, which raises questions of accountability. Despite this omission, ISB appears to have the same admission practices as ISD.[214] Consequently, Indiana's state special schools deny admission to multi-disabled students on the basis that the

206. ILL. DEP'T OF HUMAN SERVS., ILLINOIS SCHOOL FOR THE DEAF ADMISSIONS GUIDELINES (2004) (on file with author).

207. ILL. ADMIN. CODE tit. 23, § 226.730 (2004) ("Instructional classes or services for students who have either a severe/profound disability or multiple disabilities . . . shall have a maximum enrollment of five students.").

208. Interview with Sims, *supra* note 205 ("The majority of students are served in their districts, and that also applies to students with multiple disabilities. The other tricky thing, too, is that districts determine what the primary disability is, and that usually depends on what they manage to provide. Often, they bring in specialists.").

209. Indiana School for the Blind Website, http://isb.butler.edu.

210. Indiana School for the Deaf Website, http://www.deafhoosiers.com.

211. IND. CODE §§ 20-15-3, 20-16-3 (2004).

212. 514 IND. ADMIN. CODE 1-1-1-2 (2004).

213. Interview with Pam Burchett, ISD Administrator (Feb. 2005).

214. Interviews with Parents and Advocates (Feb. 2005).

school is a restrictive environment. Despite ISD's admission policies explicitly allowing for multi-disabled students to be admitted, their practices suggest that only a certain type of multi-disabled student will be admitted. Ultimately, Indiana's special schools deny admission to multi-disabled students if a nonsensory primary ongoing need exists.

11. *Kentucky (explicit exclusion)*

Kentucky houses the Kentucky School for the Blind[215] and the Kentucky School for the Deaf.[216] Both schools were created in the nineteenth century with the primary mission of educating the "pure" blind and "pure" deaf.[217] These schools continue to explicitly exclude multi-disabled students, and the courts have upheld this discriminatory practice under the Individuals with Disabilities Education Act.[218]

12. *Maryland (explicit exclusion)*

Maryland operates two campuses of the Maryland School for the Deaf (MSD)[219]—one in Frederick and the other in Columbia—and partially funds a private school—the Maryland School for the Blind (MSB).[220] Both MSD campuses provide residential and day-school programming options and offer free appropriate public education for "children from birth through age 21 who are Deaf and Hard of Hearing, reside in Maryland, and *meet the MSD admissions criteria*."[221] MSD does provide "students with additional needs [with] specialized resources with the goal of positive academic, social, and emotional growth."[222] However, these admission standards are comparable to those in California, in that they explicitly exclude multi-disabled students.[223]

Although Maryland's system is classified within the explicit exclusion model, MSB merits a brief note. MSB is a private school that receives some state funding. Its primary mission is to serve multi-disabled blind students.[224] This might appear to place the MSB program within the public-private hybrid

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215. Kentucky School for the Blind Website, http://www.education.ky.gov/.

216. Kentucky School for the Deaf Website, http://www.ksd.k12.ky.us/.

217. *See generally* KY. BD. OF EDUC., BRIEFING PAPER: HISTORY OF THE KENTUCKY SCHOOL FOR THE BLIND AND THE KENTUCKY SCHOOL FOR THE DEAF (2004).

218. *See, e.g.*, Eva N. v. Brock, 741 F. Supp. 626 (1990) (explaining in detail the Kentucky state special schools' "traditionalist" exclusionary practices against multi-disabled blind and deaf students). For more on *Eva N.*, see *supra* Part I.A.

219. Maryland School for the Deaf (MSD) Website, http://www.msd.edu/.

220. Maryland School for the Blind Website, http://www.mdschblind.org/.

221. MSD Website, *supra* note 219 (emphasis added).

222. *Id.*

223. Interview with James E. Tucker, MSD Superintendent (Jan. 2005).

224. MSB Website, *supra* note 220 ("Students who are 'just' blind attend school in their local school districts . . . . The majority of the students on our Baltimore campus are blind or visually impaired and multiply disabled. There is a very special challenge in providing services for these children and meeting their special needs, but it is a challenge we meet each and every day.").

model, but Maryland does not operate a state special school for the blind. Instead, these students are served by local schools.

13. *Massachusetts (public-private hybrid)*

Massachusetts's complex, multifaceted, public-private hybrid system of schools for the blind and deaf merits a separate study and cannot be exhaustively explored in this Note. It should be noted that Massachusetts's system falls most appropriately within the hybrid model because the state special school focuses on "pure" deaf students, while the private schools are more embracing of multi-disabled students. With respect to schools for the blind, Massachusetts does not operate a state special school. Conversely, private schools for the blind, such as the Perkins School for the Blind[225] and the Boston Center for Blind Children, include multi-disabled students.

The only state school for the deaf, the Horace Mann School for the Deaf and Hard of Hearing, is a traditional school that only accepts "pure" deaf children, as well as deaf-blind students.[226] Alternatively, the Learning Center for Deaf Children, a private school program, embraces multi-disabled students and provides a variety of special education services.[227] Various private schools, charter schools, and other educational programs assist blind and deaf students. In sum, Massachusetts falls under the public-private hybrid because the only true state special school, the Horace Mann School, excludes multi-disabled students, yet private schools extend services to these students.

14. *Michigan (primary ongoing need)*

Michigan offers two state special schools—the Michigan School for the Blind (MSB)[228] and the Michigan School for the Deaf (MSD).[229] MSB is not a traditional school for the blind; instead, it is an outreach program and resource center that serves over 2500 students with visual impairment as a primary ongoing need.[230] Many of these students are multi-disabled.

Conversely, MSD is a full-fledged school for the deaf that does not explicitly exclude multi-disabled students. MSD provides both residential and day-school programs, as well as related services to multi-disabled students. Multi-disabled students are accepted, but their primary ongoing need must be deafness. For instance, in November 2004, only 3 of the 140 total students were multi-disabled.[231] MSD admits a disproportionately lower percentage of the multi-disabled deaf community. Consequently, the Michigan system falls most

225. Perkins School for the Blind Website, http://www.perkins.org/.

226. Horace Mann School for the Deaf and Hard of Hearing Website, http://boston.k12.ma.us/mann/.

227. Learning Center for Deaf Children Website, http://www.tlcdeaf.org/.

228. Michigan School for Blind Website, http://www.msdb.k12.mi.us/MSB/msb.htm.

229. Michigan School for Deaf Website, http://www.msdb.k12.mi.us/msd/index.html.

230. Interview with Kathy Brown, MSB Principal (Mar. 2005).

231. Interview with MSD Administrator (Nov. 2004).

appropriately within the primary ongoing need model.

15. *Minnesota (primary ongoing need)*

Minnesota operates two state special schools—the Minnesota State Academy for the Blind (MSAB)[232] and the Minnesota State Academy for the Deaf (MSAD).[233] Both schools offer residential placements to enrolled students—those who cannot receive a FAPE in their LEAs—as well as additional services for nonenrolled blind and deaf students throughout the state. State law mandates that the Board of the Minnesota State Academies set admission standards for their respective schools[234] and that multi-disabled students may attend.[235]

However, the Board has specific authority to exclude multi-disabled students. Although the Board does not publicly release its admission criteria, interviews with advocates and parents indicate that the IEP team must determine that the multi-disabled student's primary ongoing need is sensory. If it is not, both MSAD and MSAB will deny the student admission in favor of a local placement.[236] Thus, Minnesota's system falls within the primary ongoing need model.

16. *Missouri (primary ongoing need)*

Missouri has two state special schools—the Missouri School for the Blind (MSB)[237] and the Missouri School for the Deaf (MSD).[238] Both state special schools offer residential placements, and MSB also provides day-school programming for some students. The admission process requires that an LEA recommend the qualified student for placement at either MSD or MSB. The LEA must prove that it cannot provide a FAPE for the student and must justify how the state special school meets the student's educational needs. Once the IEP team has determined that the state special school is the appropriate placement, the state special school confirms that the student will benefit from her education at the school.[239]

Although neither school explicitly excludes multi-disabled students in its admission policy, state special school administrators do turn down students whose primary ongoing need is not sensory. Even if the LEA determines that

232. Minnesota State Academy for the Blind Website, http://www.msab.state.mn.us/.

233. Minnesota State Academy for the Deaf Website, http://www.msad.state.mn.us/.

234. MINN. STAT. § 125A.68 (2004).

235. MINN. STAT. § 125A.69 (2004) ("*Pupils with multiple handicaps eligible to attend.* This section does not prevent a pupil with handicaps in addition to being (1) deaf or hard of hearing, or (2) blind or visually impaired from attending the academy for the deaf or the academy for the blind, respectively.") (emphasis added).

236. Interview with Pat Clark, Administrator, Minn. State Academies (Nov. 2004).

237. Missouri School for the Blind Website, http://www.msb.k12.mo.us/.

238. Missouri School for the Deaf Website, http://www.msd.k12.mo.us/.

239. MO. SCH. FOR BLIND & MO. SCH. FOR DEAF, STATE PLAN: GUIDELINES FOR REFERRAL (2004) (on file with author).

the student should be placed at the state special school, often the MSD or MSB decides not to admit the student because she has another disability that is more predominant than the sensory impairment.[240] Consequently, the Missouri system best fits within the primary ongoing need model.

17. *Nevada (no state special schools)*

There are neither state special schools nor private schools for the blind or deaf in Nevada.[241] Typically, "pure" and multi-disabled blind and deaf students are accommodated in local schools, or parents choose to enroll them in out-of-state private special schools for the blind or deaf.[242]

18. *New Hampshire (no state special schools)*

New Hampshire does not operate a state special school, though the state does have specialized programs at local schools for both the blind and deaf.[243] New Hampshire's first (private) charter school for deaf and hard of hearing students, the Laurent Clerc Academy, was instituted in 2004.[244]

19. *New Jersey (most inclusive / embracing)*

New Jersey has one state special school that advances an inclusive model for multi-disabled students. Established in 1883, the Marie H. Katzenbach School for the Deaf[245] offers residential and day-school programs to students in New Jersey and surrounding states. The Katzenbach School is managed by a superintendent, under the direction of the New Jersey Commissioner of Education. The superintendent receives input from a Citizen Advisory Board, whose members are recommended for appointment by the New Jersey State Board of Education and approved by the Governor.[246] There are no state special schools for the blind, but visually impaired students may attend the Saint Joseph School for the Blind, a private nonprofit that, since 1960, has exclusively served students who are visually impaired with additional disabilities from the New Jersey-New York metropolitan area.[247]

The Katzenbach School's general admissions policy openly accepts multi-disabled students by stating that all "[d]eaf persons of suitable age and capacity

240. Interview with Sharon Brown, MSD Administrator (Nov. 2004).

241. *See* Nevada Department of Education Website, http://www.doe.nv.gov/.

242. Interview with Frankie McCabe, Dir., Nev. Special Educ. Programming (Oct. 2004).

243. New Hampshire Department of Education Website, http://www.ed.state.nh us/.

244. Laurent Clerc Academy Website, http://www.nhdeaf-hh.org/lca_info.html.

245. New Jersey School for the Deaf, Katzenbach Campus Website, http://www.mksd.org/. The Katzenbach School offers educational programs, audiological services, speech therapy, counseling, adaptive physical education, and substance abuse prevention education to students, as well as outreach to school districts and other agencies. *Id.*

246. N.J. STAT. ANN. §§ 18A:61-1 to 18A:61-5 (2005) (outlining regulations for the Katzenbach School).

247. Saint Joseph School for Blind Website, http://www.sjsb.net/textsite/index.htm.

for instruction" should be considered for admission.[248] Furthermore, the school conducts a "multi-handicapped program," which is staffed by instructors with special training to work with multi-disabled students.[249] Based on these explicitly inclusive policies, deaf students who have additional disabilities are fully eligible for admission into New Jersey's state special school for the deaf. Consequently, the New Jersey system for deaf instruction would fall within the most inclusive model for multi-disabled students—though New Jersey lacks a similar state special school for the blind.

20. *New Mexico (inclusive if possible)*

There are two state special schools in New Mexico: the New Mexico School for the Visually Handicapped (NMSVH)[250] and the New Mexico School for the Deaf (NMSD).[251] NMSVH is a residential facility that provides comprehensive academic, nonacademic, and extracurricular services to its students, as well as extending a variety of services to parents, public/private schools, institutions, and agencies throughout the state. NMSD provides similar services for students who are deaf or hearing impaired.

The New Mexico State Board of Education outlines each school's general admission policy that ensures that "a child with a disability who is placed in or referred to a state-supported educational program by another public agency has all the rights of a child with a disability who is served by any other public agency."[252] Although the Board has set the same standards for both schools, a lack of uniformity between the admission standards for NMSVH[253] and NMSD[254] is apparent in the enrollment eligibility of students with multiple disabilities. For example, NMSVH considers the educational needs of multi-disabled visually impaired students and also provides services for preschool children who "meet the criteria within state regulations for 'Developmental Delay,' 'Established Condition,' or 'At Risk for Developmental Delay.'"[255] Conversely, NMSD's policy for multi-disabled children places an emphasis on determining a primary disability and excludes those who do not have deafness as a primary disability.[256]

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248. N.J. STAT. ANN. § 18A:61-3 (2005).

249. *See* KATZENBACH SCHOOL, MULTI-HANDICAPPED PROGRAM BROCHURE (2004) (on file with author).

250. New Mexico School for the Blind and Visually Impaired Website, http://www.nmsvh.k12.nm.us/.

251. New Mexico School for the Deaf Website, http://www.nmsd.k12.nm.us/.

252. N.M. STAT. ANN. § 6.31.2.11(J)(1)(b) (2005).

253. NMSVH POLICY 500, http://www.nmsvh.k12.nm.us/P&P/500%20Educational%20Program.doc.

254. NMSD ADMISSIONS REGULATIONS (on file with author).

255. NMSVH POLICIES 500, 508, http://www.nmsvh.k12.nm.us/P&P/508%20Qualifying%20Criteria%20for%20Outreach%20Itinerant%20Services.doc.

256. N.M. STAT. ANN. § 6.31.2.11(J) (2005).

Based on these admission policies, blind and deaf students who also have developmental delays or other mental disabilities are treated differentially by each school. NMSVH explicitly considers multi-disabled students in its admission policy, while NMSD allows determinations based on what evaluators deem the "primary disability." Consequently, a deaf student who also has developmental delays or other mental disabilities may be denied admission. Because New Mexico's decentralized policy results in discrepant inclusion of multi-disabled students in state special schools for the blind and deaf, the state special school system fits within the inclusive if possible model.

21. *New York (most inclusive / embracing)*

New York's hybrid network of state-operated public schools, state-sponsored private schools (e.g., charter schools), and state-approved private schools situates the state in a unique position to explicitly serve multi-disabled children in its public state special schools for the blind and deaf. New York operates two state special schools: the New York State School for the Blind (NYSSB)[257] and the New York State School for the Deaf (NYSSD).[258] The Superintendent of State Special Schools supervises and manages these schools, subject to oversight by the Board of Regents.[259] Blind or deaf students are also served by twelve state-supported schools, which are privately run but subject to regular reviews by the State Commissioner of Education.[260] An extensive private school system complements state-operated and state-supported schools to better serve blind and deaf students.[261]

NYSSB and NYSSD are both residential and day facilities that provide a comprehensive educational program, as well as therapy and counseling for students and parents. Each school's admission standards are outlined by the state legislature but are primarily determined by the Commissioner of Education. New York laws also outline general admission criteria for each state special school that encompass all blind and deaf children between three and twenty-one years of age who are legal residents and "of suitable capacity for instruction."[262] NYSSB and NYSSD have similar general admission requirements, with discretion given to the Commissioner of Education.

Furthermore, NYSSB's eligibility criteria reflect a preference for students who have multiple disabilities. NYSSD does not outline the same requirements on its website, but the Superintendent of NYSSB and NYSSD indicated that

257. New York State School for the Blind Website, http://www.vesid.nysed.gov/specialed/nyssb/.

258. New York State School for the Deaf Website, http://www.vesid.nysed.gov/specialed/nyssd/.

259. N.Y. EDUC. LAW §§ 4307, 4354 (Consol. 2005).

260. Id. § 4201.

261. For a list of state-operated, state-supported, and state-approved private schools for individuals with disabilities, see http://www.vesid.nysed.gov/specialed/privateschools/ and http://www.vesid.nysed.gov/specialed/privateschools/4201ss.htm.

262. N.Y. EDUC. LAW §§ 4308, 4355 (Consol. 2005).

the unique, expansive network of public and private schools for the blind and deaf allows the state special schools to prefer for multi-disabled children.[263] Based on these admission policies, blind and deaf students who also have developmental delays or other mental disabilities are fully eligible—and, in fact, are *preferred* for admission into state special schools. This hybrid private-public model includes multi-disabled students in state special schools, but it also creates incentives to place "pure" deaf or blind students in private special schools—placing in doubt whether it is an inclusive policy.

22. *Ohio (primary ongoing need)*

Ohio has two state special schools: the Ohio School for the Deaf (OSD)[264] and the Ohio State School for the Blind (OSSB).[265] Both provide educational and social services for their students, as well as related resources for state institutions. Both are operated by a superintendent employed by the State Board of Education. State law stipulates admission requirements for the state special schools and does not make specific consideration for multi-disabled students. The state education code, however, does imply exclusion in its eligibility criteria: "The child must have the potential for physical and social maturity to adjust to the discipline of formal instruction and group living."[266] Given this requirement, a deaf or blind child with additional disabilities may be deemed "socially immature" and thus not eligible for admission into the state school.

However, OSSB's mission statement seeks inclusion of blind students with additional disabilities.[267] OSSB's interpretation of the education code allows it to accept multi-disabled blind students. In contrast, OSD's admission criteria for multi-disabled students are unclear from written policies. Thus, Ohio is an example of an ambiguous state policy that leaves room for interpretation at the individual school level. Although its education code implies exclusion based on high physical and social standards, it is evident that at least one of the schools (OSSB) explicitly includes multi-disabled students in its mission statement. Overall, Ohio's state policies do not openly accept or reject multi-disabled students, leaving discretion to its state schools.

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263. Interview with Jennifer Spas Ervin, NYSSB & NYSSD Superintendent (Dec. 1, 2004) ("We're able to serve special needs kids because the private New York schools can pick up those kids without mental retardation.").

264. Ohio School for the Deaf Website, http://www.ohioschoolforthedeaf.org/home/.

265. Ohio State School for the Blind Website, http://tlcf.osn.state.oh.us/ohiostate/main.htm.

266. OHIO ADMIN. CODE § 3301-51-20(A)(3)(d) (Anderson 2005).

267. OSSB MISSION STATEMENT ("[OSSB] . . . is dedicated to the intellectual, social, physical, and emotional growth of students with visual impairments, *including those with multiple disabilities*.") (emphasis added), http://tlcf.osn.state.oh.us/ohiostate/main.htm.

23. *Oregon (most inclusive / embracing)*

Oregon has two state special schools—the Oregon School for the Blind (OSB)[268] and the Oregon School for the Deaf (OSD).[269] The State Board of Education designates each school's enrollment policies, and the Department of Education sets criteria for admittance to the state special schools. Students are admitted to OSB and OSD after being referred by their home districts.[270] Although each school has separately written admission policies, both have "Special Provisions" aimed to serve multi-disabled students.[271] These provisions suggest that multi-disabled students are admitted. After the LEA refers students, four considerations determine their admittance:

> [1.] The services needed to implement the IEP which may include, but are not limited to, areas such as academics; self-help, social, interpersonal, independent living, orientation and mobility skills; vocational training; and language development;
> [2.] A learning environment in which there is ample opportunity for the student to have meaningful communication with other students and teachers and exposure to cultural factors related to the student's disability;
> [3.] The student's need for direct instruction in an alternative communication system; and
> [4.] The extent of curriculum and instructional adaptations needed.[272]

By law, Oregon explicitly seeks to accommodate multi-disabled students. Because policies drafted by the Oregon State Board of Education are embracing, clear admission guidelines dictate that multi-disabled students be allowed to attend state special schools.

24. *Pennsylvania (public-private hybrid)*

Pennsylvania has a unique hybrid system of state-operated public and state-funded charter special schools that allows it to serve multi-disabled children. Pennsylvania operates one state special school—the Scranton State School for the Deaf (SSSD)[273]—and funds four charter schools for the deaf and blind: the Pennsylvania School for the Deaf,[274] the Western Pennsylvania School for the Deaf,[275] the Western Pennsylvania School for Blind Children,[276]

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268. Oregon School for the Blind Website, http://www.ode.state.or.us/osb/.

269. Oregon School for the Deaf Website, http://www.osd.k12.or.us/.

270. OR. ADMIN. R. 581-016-0526(1) (2004).

271. OR. ADMIN. R. 581-016-0740, 581-016-0910 (2004) ("[Both schools will] provide instruction which is uniquely designed for the [hearing or visually] impaired and for accompanying handicaps such as [hearing or visual] impairment, autism, mental retardation, orthopedic impairment, learning disability, emotional disturbance, and other health impairments; and for special abilities (i.e., talented and gifted).").

272. OR. ADMIN. R. 581-016-0536(8)(f) (2004).

273. Scranton State School for the Deaf (SSSD) Website, http://www.neiu.k12.pa.us/WWW/SSSD/.

274. Pennsylvania School for the Deaf Website, http://www.psd.org/.

275. Western Pennsylvania School for Deaf Website, http://www.wpsd.org/home.htm.

276. Western Pennsylvania School for Blind Children Website, http://www.wpsbc.org.

and the Overbrook School for the Blind.[277] SSSD offers day-school and residential programs to students and acts as a resource center for the state.[278]

SSSD's general admission statement does not specifically address multi-disabled students,[279] but more telling of the school's inclusive policy is its "Special Needs Program," which "offers an ungraded classroom environment for *multiple handicapped students* who are deaf."[280] Examples of additional disabilities include "mental retardation, orthopedic handicaps, cerebral palsy, autism and psychological difficulties."[281] The program has been used as a "transitional placement for student[s] not yet ready to handle regular classroom placement,"[282] and mainstreaming into regular classes is also possible. SSSD's specific curriculum and accommodations for multi-disabled students are a prime example of inclusion.

Furthermore, two of the charter schools also have openly inclusive policies toward multi-disabled students.[283] Additionally, some staff members at the Overbrook School are certified in visual impairment and special education.[284] Although decentralized in its educational policies pertaining to admission requirements for multi-disabled students, Pennsylvania's system of state and charter schools seems to promote inclusion. Its single state special school, SSSD, has specific programs for students with multiple disabilities, and two of its four charter schools explicitly accept multi-disabled blind students. The hybrid state-charter model presents opportunities for multi-disabled student inclusion in Pennsylvania's special schools, although an absence of a state special school for the blind should be noted.

25. *Tennessee (primary ongoing need)*

Tennessee has three state special schools: the Tennessee School for the Deaf,[285] the West Tennessee School for the Deaf,[286] and the Tennessee School for the Blind.[287] Each school houses residential and day-school programs and offers educational, recreational, and health services to students. The schools are operated by the Tennessee State Board of Education and the Commissioner of

277. Overbrook School for the Blind Website, http://www.obs.org/.

278. SSSD Website, Scranton's History, http://www.neiu.k12.pa.us/WWW/SSSD/.

279. *See* SSSD Website, Scranton Admissions, http://www.neiu.k12.pa.us/WWW/SSSD/.

280. *See* SSSD Website, Scranton Special Needs Program (emphasis added), http://www.neiu. k12.pa.us/WWW/SSSD/.

281. *Id.*

282. *Id.*

283. *See, e.g.*, Western Pennsylvania Blind School Website, *supra* note 276 ("[I]n addition to blindness, the students who enroll here have other severe disabilities, and the educational program is tailored to their needs.").

284. *See* Overbrook School Website, *supra* note 277.

285. Tennessee School for the Deaf Website, http://tsdeaf.org/.

286. West Tennessee School for the Deaf Website, http://www.wtsd.tn.org/.

287. Tennessee School for the Blind Website, http://www.tsb.k12tn.net/.

Education. Each school is managed by a superintendent and overseen by the Director of State Special and State Agency Schools.[288]

The Commissioner of the Tennessee Department of Education sets uniform admission requirements for the three state special schools, emphasizing that a student's "primary disability must be deafness or blindness."[289] Thus, blind or deaf students whose other disability is deemed to be primary may be rejected from the state special schools. Additional indicators of an exclusive policy lie in the "behavioral considerations" requirements: "The student has the ability to function behaviorally in a 'group' living/leisure situation."[290]

Although multi-disabled students are not explicitly excluded, the admission criteria imply that multi-disabled blind or deaf students may be excluded because they do not meet the "primary sensory disability" or "group living capability" conditions. These policies leave discretion for the Superintendent and Director of State Special Schools to determine the standards for each criterion, but they are still disposed to exclusion. Consequently, Tennessee's centralized administration of its state special schools follows the primary ongoing need model that allows for the exclusion of multi-disabled students.

26. *Texas (most inclusive / embracing)*

Texas serves as the "best practices" model for including multi-disabled students in state special schools. The Texas School for the Deaf (TSD)[291] and Texas School for the Blind and Visually Impaired (TSBVI)[292] employ admission policies that explicitly allow multi-disabled students to enroll in their respective schools. Both schools offer residential and day-school programs for all deaf or blind students under twenty-one years of age.

These state-operated schools are overseen by the Texas State Legislature, the State Board of Education, and the Commissioner of Education. General admission policies for TSD and TSBVI were last amended by the state legislature in 1995,[293] while the Board of Education and the Commissioner of Education establish the more finite details of the admission criteria. TSD does not accept students who would be better served in a treatment facility due to behavioral disorders and mental health issues,[294] but the school explicitly states that multi-disabled students will be admitted and provided a specialized program.[295] Interviews reinforced that multi-disabled students are admitted and

288. *See* West Tennessee School Website, *supra* note 286.

289. *See* UNIFORM ADMISSION PROCEDURES FOR STATE SPECIAL SCHOOLS § (I)(A)(1) (2004) (on file with author).

290. *See id.* § (I)(C)(1).

291. Texas School for the Deaf Website, http://www.tsd.state.tx.us/.

292. Texas School for Blind and Visually Impaired Website, http://www.tsbvi.edu/.

293. TEX. EDUC. CODE ANN. §§ 30.001 *et seq.* (2004).

294. TSD Admissions: FAQ, http://www.tsd.state.tx.us/admissions/faq.html.

295. *Id.* ("A student will be admitted to TSD if the student needs comprehensive educational services, on a day or residential basis; short-term services to allow a student to

provided the additional services to meet FAPE requirements.[296]

Similar to TSD, TSBVI considers whether a student is best served at her home school during the admissions process.[297] Furthermore, TSBVI educates all students who are within its designated jurisdiction and does not discriminate on the grounds of additional disabilities.[298] Ultimately, TSBVI admission policies are virtually the same as those of TSD. Both schools explicitly utilize Section 504's antidiscrimination language in their admission statements.[299] Consequently, the Texas approach falls within the most embracing model for including multi-disabled students in the state special schools.

27. *Utah (inclusive if possible)*

The Utah Schools for the Blind and Deaf are a statewide resource that provide the following services: "a residential program, satellite school programs, preschools, Parent Infant Programs (PIP), mainstream classrooms, integrated classrooms, consultants, and support services."[300] The residential schools are located in Ogden, and the residential program houses one of the nation's premier deaf-blindness divisions.[301] The school also explicitly caters to multi-disabled students in its residential program, so long as there are sufficient resources to serve the students.[302] Because Utah's approach includes multi-disabled students but also faces capacity constraints, it corresponds best with the inclusive if possible model.

28. *Virginia (most inclusive / embracing)*

Virginia operates two state special schools: the Virginia School for the Deaf and Blind at Staunton (VSDB)[303] and the Virginia School for the Deaf, Blind, and Multi-Disabled at Hampton (VSDBMD).[304] Established in 1838, VSDB is the second-oldest special school for the deaf and blind in the United States and provides residential placements for blind and deaf children.[305] VSDB does not appear to accommodate children with multiple disabilities.

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better achieve educational results from services available in the community; and, for students with additional disabilities, a specialized program.").

296. Interviews with Advocates and Parents (Jan. 2005).

297. TSBVI EQUAL EDUCATIONAL OPPORTUNITIES, *Placement* (basing policy on 34 C.F.R. § 104.35 (2005)), http://www.tsbvi.edu/policy/fb.htm .

298. *Id.*, *Section 504 Handicapped Students* (basing policy on 29 U.S.C. § 794 (2004); 42 U.S.C. § 12132 (2004); 34 C.F.R. 104.4(a) (2005)).

299. For more on Section 504, see *supra* Part II.B.

300. Utah Schools for the Blind and Deaf Website, http://www.usdb.org/.

301. *Id.*

302. Interview with Linda Rutledge, Superintendent, Utah Schools for Blind and Deaf (Nov. 2004); *see also* Interviews with Advocates and Parents (Jan. 2005).

303. Virginia School for the Deaf and the Blind Website, http://www.vsdb.state.va.us/.

304. Virginia School for the Deaf, Blind, and Multi-Disabled at Hampton Website, http://www.vsdbmh.virginia.gov/.

305. *See* VSDB Website, *supra* note 303.

Instead, it appears to be a school for the "pure" blind and deaf.[306]

Conversely, VSDBMD at Hampton is specifically tailored to students with multiple disabilities. Established in 1887 in response to the Staunton school's lack of educational opportunities for African-American blind and deaf students, the school was initially named the Virginia School for Colored Deaf and Blind Children. However, the Virginia General Assembly mandated that VSDBMD specifically serve multi-disabled blind and deaf children. Today, its main mission is to serve the multi-disabled blind and deaf community, as a way to complement the VSDB's focus on the pure blind and deaf.[307]

Although Virginia's schools are not inclusive—in that the "pure" and the multi-disabled blind and deaf are segregated in two different schools in different cities—the state's approach is embracing of multi-disabled students because they include them in *a* state special school. Consequently, Virginia's approach paradoxically best fits within the most inclusive/embracing model.

29. *Washington (primary ongoing need)*

Washington operates two state special schools: the Washington School for the Deaf (WSD)[308] and the Washington School for the Blind (WSB).[309] Both schools are under similar direction—overseen by a superintendent and board of trustees[310]—and both offer residential and day-school facilities that provide academic and nonacademic programs for their students. In addition to blind- and deaf-specific services, students have access to specialized counseling and peer interaction that may not be found in their local districts.

A large portion of the WSD and WSB admission criteria is determined by the state legislature, with each school's superintendent setting specific criteria. For instance, the WSD admission policy provides that WSD will "not admit a student if existing WSD resources cannot provide for the proper care, education, training, or transportation of the student *unless* an inter-agency agreement can be executed with the local school district."[311]

Additionally, the WSD criteria deny admission to students who "present[] a safety risk that cannot be effectively mitigated through a safety plan," as well as students whose "*primary ongoing needs* are related to severe emotional, behavioral, or mental disorders."[312] Under this criteria, multi-disabled students *may* be denied admission to WSD on grounds that their primary ongoing needs are mental or emotional, not deafness. Interviews (and legal research) did not confirm whether this policy is abused to exclude all multi-disabled students,

306. Interviews with Advocates and Parents (Feb. 2005).
307. *See* VSDBMD Website, *supra* note 304.
308. Washington School for the Deaf Website, http://www.wsd.wa.gov.
309. Washington School for the Blind Website, http://www.wssb.wa.gov.
310. WASH. REV. CODE § 72.40.010 (2004).
311. *Id.* § 72.40.040.
312. WSD ADMISSION POLICY, *supra* note 45 (emphasis added).

although evidence of some being admitted was found.[313] The State of Washington is an example of the fuzzy middle ground of states that allow multi-disabled students to attend so long as their primary ongoing need is blindness or deafness, not some other mental or emotional disability.

30. *Wisconsin (most inclusive / embracing)*

Wisconsin has two state special schools: the Wisconsin Center for the Blind and Visually Impaired (WCBVI)[314] and the Wisconsin School for the Deaf (WSD).[315] The schools' admission policies are determined by the state legislature and implemented by the Wisconsin Department of Public Instruction. Despite broad and malleable enrollment policies, Wisconsin's special schools are open to and used by multi-disabled students.

In order for students to attend WCBVI and WSD, an IEP team must determine that a student will be best served at one of the state special schools.[316] IEP teams determine if modifications and changes can be made to improve the education of deaf or blind students in their home school districts; if not, students may enroll at a state special school.[317] An evaluation of the WCBVI notes that "75 percent of students enrolled in the residential school have disabilities in addition to their vision impairments, some of which are quite severe."[318] According to the school's website, WSD "offers innovative learning structures for students that are deaf or hard of hearing and students with multiple disabilities."[319]

Multi-disabled deaf and blind students appear to have equal access to state special schools in Wisconsin; indeed, these schools may actually be specialized in serving multi-disabled students. Outreach programs for blind[320] and deaf[321] students allow local public schools to better serve students, thus allowing students with substantial special educational challenges to attend an appropriate state special school. Ultimately, state legislation leaves open the option of discrimination against multi-disabled students; notwithstanding, special school policies are particularly embracing of multi-disabled students.

313. Interviews with Advocates and Parents (Jan. 2005).

314. Wisconsin Center for the Blind and Visually Impaired Website, http://www.wcbvi.k12.wi.us.

315. Wisconsin School for the Deaf Website, http://www.wsd.k12.wi.us.

316. WIS. ADMIN. CODE § 11.35(1) (2004).

317. *Id.* § 11.35(3)(a-c).

318. LEGISLATIVE AUDIT BUREAU, REP. NO. 03-6 STATE OF WISCONSIN 24 (2003).

319. *See* WSD Website, *supra* note 314.

320. Blind and Visually Impaired Outreach Website, http://www.wcbvi.k12.wi.us/outreach/index.html.

321. Deaf and Hard of Hearing Outreach Website, http://www.wesp-dhh.wi.gov.